



RESEARCH PAPER 05/86
7 DECEMBER 2005

The *Armed Forces Bill*

Bill 94 of Session 2005-2006

The *Armed Forces Bill* (Bill 94 of Session 2005-06) was presented on 30 November 2005.

Second Reading is scheduled for 12 December 2005.

The intention of the Bill is to consolidate and modernise the provisions of the three Service Discipline Acts: the *Army Act 1955*, the *Air Force Act 1955* and the *Naval Discipline Act 1957*. These Acts will be repealed on the passage of this Bill into law.

This paper should be read in conjunction with Library Research Paper RP05/75, *Background to the Armed Forces Bill*, 11 November 2005, which provides an outline of the current disciplinary system, some pre-legislative comments and sets out a number of issues that may be the subject of discussion as this Bill progresses.

Claire Taylor

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Summary of main points

The aim of the *Armed Forces Bill* is to modernise Service legislation by consolidating the existing Service Discipline Acts (SDA) into a single system of Service law and by incorporating changes that have been, or are being made, to the civil criminal justice system. It is not the intention of the Bill to amend significantly or affect the fundamental principles of the existing system of Service discipline, but to update and modify existing provisions in order to support operational effectiveness, to ensure consistency and fairness across the three Services and to ensure compliance with the European Convention on Human Rights.

There are nine key proposals in the Bill: to harmonise offences across all three Services; to harmonise the disciplinary powers of Commanding Officers; to establish a regime governing the investigation of alleged offences; to create a single Prosecuting Authority; to establish a unified court martial system, including the creation of a single standing Court Martial; to establish a single Court Administration Officer for the Court Martial, the Summary Appeal Court and the Service Civilian Court; to abolish the right of the Reviewing Authority to review court martial convictions; to improve and harmonise Board of Inquiry procedure; and to improve and harmonise systems for the redress of grievances.

In particular, under those general proposals:

- All Commanding Officers (CO) will be able to deal summarily with certain officers and warrant officers, in addition to non-commissioned personnel. The range of criminal conduct (civil) offences that can be heard summarily, and the sentences that can be imposed, will increase for Army and RAF COs, while the summary powers of naval COs will be curtailed.
- Charges in relation to more serious offences, such as assisting the enemy or mutiny, and criminal conduct offences, such as murder, manslaughter, or treason, will no longer be dealt with by COs, meaning that they will no longer have the power to dismiss charges in relation to offences they could not deal with summarily. A CO will have a duty to make Service police aware of allegations of more serious offences so that they can be investigated and cases in which there is sufficient evidence to bring charges will be referred directly to the Director of Service Prosecutions.
- The right to elect trial by Court Martial will be universal.
- The jurisdiction of the Court Martial will be extended to include more serious offences committed in the UK, such as murder or manslaughter, in the same way that those offences can be tried at present by courts martial if committed by persons subject to Service law overseas.
- The Bill applies, with modifications, the provisions of the *Criminal Justice Act 2003*, with regard to both general sentencing principles and more specifically to the provisions relating to the imprisonment of adults, custodial sentences for young offenders and mandatory sentences for certain offences.
- Where the Court Martial awards a sentence of imprisonment, that sentence will no longer automatically incur dismissal with or without disgrace from HM Services.
- Standing Civilian Courts will be replaced by a single Service Civilian Court whose jurisdiction will be extended to civilians accompanying the Royal Navy.
- Service Complaints Panels will be established and take on some of the current work of the Service Boards with respect to complaints. An independent person will sit on those panels in cases prescribed by regulations. However, the explanatory notes

suggest that the presence of an independent member of the panel is likely to be appropriate in complaints relating to bullying or harassment.

- Service inquiries will replace the different statutory and non-statutory provisions for holding formal inquiries, whether they are Boards of Inquiry, Unit and Regimental inquiries or ships' investigations.

In addition, the requirement for renewal of this legislation on an annual basis by Order in Council will be abolished. The Armed Forces Act will in future be subject to renewal every five years.

The majority of specific provisions relating to the system of Service discipline, and other related matters, will be set down in secondary legislation under regulations to be made by either the Secretary of State or the Defence Council.

This paper should be read in conjunction with Library Research Paper RP05/75, *Background to the Armed Forces Bill*, 11 November 2005. That paper sets out the current provisions of the military disciplinary system, the main aims of this Bill, some pre-legislative comments and a number of issues that may take on greater relevance with the passage of legislation.

This paper, in contrast, looks solely at the main clauses of the Bill.

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I Provisions of the Bill

The aim of the *Armed Forces Bill* is to modernise Service legislation by consolidating the three existing Service Discipline Acts (SDA) into a single system of Service law. It also incorporates a number of changes that have been, or are being made, to the civil criminal justice system.¹ It is not the intention of the Bill to significantly amend or affect the fundamental principles of the existing system of military discipline. Instead the aim is to update and modify existing provisions in order to support operational effectiveness, to ensure consistency and fairness across the three Services and to ensure compliance with the European Convention on Human Rights.

The key proposals in the *Armed Forces Bill* are:

1. To harmonise both Service disciplinary offences and civil offences across all three Services.
2. To harmonise the disciplinary powers of Commanding Officers.
3. To create a single Service Prosecuting Authority (headed by the Director of Service Prosecutions).
4. To establish a regime governing the investigation of alleged offences.
5. To establish a single court martial system, including the creation of a single standing Court Martial.
6. To establish a single Court Administration Officer for the Court Martial, the Summary Appeal Court and the Service Civilian Court.²
7. To abolish the right of the Reviewing Authority to review court martial convictions.
8. To improve and harmonise Board of Inquiry procedure.
9. To improve the redress of grievances.

In addition it sets new provisions in terms of the application of Service law to civilians.

This paper examines the main clauses of the Bill. Due to the length of the Bill it does not do so on a clause-by-clause basis, but is set out in Parts to reflect, as far as possible, the structure of the Bill. Some of the more detailed provisions relating to the Service disciplinary system are expected to be made in secondary legislation. It should be noted that a number of the proposals outlined above cut across several parts of the Bill, and therefore will be covered in more than one of the sections below.

Background to the Bill, including an outline of the present system of military law, some pre-legislative comments and issues that may take on greater significance with the passage of this legislation, is set out in Library Research Paper RP 05/75, *Background to the Armed Forces Bill*, 11 November 2005.³

¹ It is important to note the two ways in which the term “civil law” is used. Within the UK justice system “civil law” is used as a contrast to “criminal law”. However, within a military context “civil law” is used as an all encompassing term and as a contrast to “military law”.

² The Service Civilian Court replaces the Standing Civilian Court referred to in the *Army Act 1955* and the *Air Force Act 1955*.

³ This paper is available online at: <http://www.parliament.uk/commons/lib/research/rp2005/rp05-075.pdf>

A. Definitions and Application

Various changes made in this Bill rely upon an understanding of the applicability of Service law both in terms of people and in terms of territorial jurisdiction. Section I A of Library Research Paper RP05/75 examines the applicability of the SDA and the current arrangements for the renewal of that legislation.

Part 18 and Part 19 set out various definitions for the purposes of this Bill. Part 18 defines the terms ‘Commanding Officer’ (CO) and ‘Higher Authority’ (HA) and also provides for the appointment by HM The Queen of the Director of Service Prosecutions (DSP) as head of the Service Prosecuting Authority, along with the qualifications required for that appointment. In addition it also provides for the appointment of Prosecuting Officers by the DSP.⁴

Part 19 defines who is subject to the provisions of this Bill and sets out the commencement, expiry and territorial scope of this legislation.

1. Application

Clauses 357-361 outline the three categories of persons that are subject to the provisions of the Bill:

- Persons subject to Service law
- Civilians subject to Service discipline
- Naval chaplains

There are very few changes proposed with regard to the application of Service law to Service personnel as defined in **clauses 357-359**.

However, the application of Service law to civilians is altered slightly. In **clause 360** those persons designated within **Part 1 of Schedule 13** are considered “civilians subject to Service discipline”. The main categories of civilian considered to fall within the scope of this definition are not significantly different than at present. However, provision is made in Schedule 13 for a wider range of civilians to be designated with the authorisation of the Defence Council where it is considered necessary, or by the Secretary of State through secondary legislation. This latter point is particularly relevant to the application of Service law to members of organisations such as private security companies.

The main change in terms of the application of Service law to civilians comes with the offences with which a civilian could be charged and tried by the Service Civilian Court (SCC) or by Court Martial.⁵ At present, offences vary depending on whether or not a person is accompanying the Armed Forces while on active service. That distinction is removed in this Bill and the offences with which a civilian can be charged, at any time,

⁴ The current required qualifications of the Service Prosecuting Authorities are set out in section I B4 of RP05/75.

⁵ Civilians will no longer be dealt with summarily.

are now more limited by virtue of the fact that the majority of Service disciplinary offences will no longer apply to civilians. This is examined in greater detail in section I B1 below.

In addition, provision is made in **clause 361** for the Secretary of State to make those elements of the Bill that apply to officers generally, applicable to naval chaplains. The inclusion of this clause is considered necessary as naval chaplains, unlike RAF and Army chaplains, do not wear a rank and are commissioned simply as a chaplain rather than as an officer within a chaplains' branch of the Services.

Under **clause 363** any power to make orders, regulations or rules under this Act, when it comes into force, will be exercisable by Statutory Instrument.⁶ Subsections 3 and 4 set out which Statutory Instruments will be subject to the affirmative resolution procedure and which will be subject to the negative resolution procedure.⁷

Territorial provision is made in **clause 373**. The Bill is extended to the British Overseas Territories and the Isle of Man (although its provisions may be modified by Order in Council to fit in with their local laws). Provisions of the Bill may also be extended to the Channel Islands by Order in Council (with modifications if necessary), although the Bill does not automatically extend to them.

2. Renewal of the Armed Forces Act

Under **Schedule 15** the *Army Act 1955*, the *Air Force Act 1955* and the *Naval Discipline Act 1957* are repealed in full.

Under **clause 371** the new Act will expire five years after the date on which it is passed into law. Therefore, this legislation will continue to be subject to quinquennial review, as it is at present.

However, it does not make provision for the annual renewal arrangements of this legislation by Order in Council. This element of renewal of armed forces legislation will therefore be abolished.

B. Service Discipline

1. Part 1 – Offences

In summary, Part 1 (**clauses 1-49**) sets out the main offences that may be committed under Service law.⁸ These include both Service-only offences, referred to in the explanatory notes as disciplinary offences; and civil offences, which are referred to as criminal conduct offences.

⁶ This includes those orders, regulations and rules to be made by the Defence Council.

⁷ An explanation of the parliamentary procedure for Statutory Instruments is available in the Library Fact Sheet on *Statutory Instruments* which is available online at: http://www.parliament.uk/parliamentary_publications_and_archives/factsheets/107.cfm

⁸ These are generically referred to in the Bill and Explanatory Notes as Service offences.

The explanatory notes state that with the exception of clause 49 (Air Navigation Order offences) all of the offences in Part 1 are revisions of offences that already exist under the SDA. However, there are some Service disciplinary offences that have been removed either from this Part or from the Bill in its entirety. These are outlined below.

Jurisdiction over, and the investigation of, these offences is examined in section I B2 (Part 2 - Jurisdiction and Time Limits) and section I B5 (Part 5 – Investigation, Charging and Mode of Trial) of this paper.

a. Service Disciplinary Offences

Service disciplinary offences are set out in the existing SDA in clauses 24-69 of the *Army Act 1955* and *Air Force Act 1955* and clauses 2-41 of the *Naval Discipline Act 1957*.

Most Service disciplinary offences reflect the particular circumstances of Service life and operations and as such generally have no equivalent in the civil system. There are some exceptions however, such as the offence of damage to or loss of public or Service property, which are retained because of the implications of the offence for Service discipline.

Service-only offences are set down in **clauses 1-41** of the Bill. A table outlining those offences along with the relevant clauses in the SDA is available in Appendix One.

The explanatory notes set out the background to each offence, revised or otherwise, in the Bill, while also providing further detail on the nature of each offence, including the element of willfulness or intention required in each. The notes also outline the maximum punishment that is available in each case.

Those Service-only offences that have been removed either from this Part, or the Bill as a whole, include:

- Failure to provide a sample for drug testing⁹ and failure to provide sample after serious incident¹⁰ – these are now set out in Chapter 1, Part 13 (Discipline: Miscellaneous and Supplementary) and covered in section I B13 of this paper.
- Offences relating to issues and decorations.¹¹
- Billeting offences.¹²
- Offences in relation to the requisitioning of vehicles etc.¹³
- False statements on entry¹⁴ and Making of false statements on enlistment¹⁵ – these are now set out in Part 14 (Enlistment, Terms of Service etc) and covered in section I C1 of this paper.

⁹ s.12A, *Naval Discipline Act 1957* and s. 34A, *Army Act 1955* and *Air Force Act 1955*

¹⁰ s. 12B, *Naval Discipline Act 1957* and s. 34B, *Army Act 1955* and *Air Force Act 1955*

¹¹ s. 31, *Naval Discipline Act 1957* and s. 46, *Army Act 1955* and *Air Force Act 1955*

¹² s. 32, *Naval Discipline Act 1957* and s.47, *Army Act 1955* and *Air Force Act 1955*

¹³ s. 33, *Naval discipline Act 1957* and s. 48, *Army Act 1955* and *Air Force Act 1955*

¹⁴ s. 34A, *Naval Discipline Act 1957*

¹⁵ s. 61, *Army Act 1955* and *Air Force Act 1955*

- Offences against civilian population.¹⁶
- Cruelty or scandalous conduct by officers¹⁷ and Scandalous conduct by officers.¹⁸
- Offences in relation to court martial¹⁹ – these are now set in Chapter 2, Part 13 (Contempt of court) and covered in section I B13 of this paper.

b. Criminal Conduct (Civil) Offences

At present civil offences are covered by section 70 of the *Army Act 1955* and *Air Force Act 1955* and section 42 of the *Naval Discipline Act 1957*.

A Criminal Conduct offence is defined by **clause 42** of this Bill as an offence that:

- a) is punishable by the law of England and Wales; or
- b) if done in England and Wales, would be so punishable.

Under subsection 2 a person may be charged with a criminal conduct offence even if, on the same facts, he/she could be charged with a differing Service disciplinary offence. The actual charge preferred would be dependent upon the circumstances of the offence.

Clauses 43-47 make provision for attempts, conspiracy or incitement to commit such offences, and for aiding, abetting, counselling or procuring criminal conduct, to be considered criminal conduct offences in themselves.

All of these clauses also provide for the maximum punishments that may be awarded.

Clause 48 determines that a person subject to Service law may commit an offence of attempting, inciting, aiding or abetting and so on, regardless of where the act takes place (i.e. both in the UK and overseas).

Clause 49, regarding air navigation order offences, is an extension of the criminal conduct offence. It makes provision for offences that would be air navigation order offences under the *Civil Aviation Act 1982* if committed in a civil aircraft to be offences under clause 42 if committed in a military aircraft by Service personnel or civilians subject to Service discipline.

c. Main Changes in the Bill

The main change in this Bill, in relation to the offences that can be committed under Service law, are those that would be applicable to civilians.

In existing legislation, civilians accompanying the Armed Forces on active service can be charged with all Service offences, with the exception of section 61 (making a false

¹⁶ s.35A, *Naval Discipline Act 1957* and s.63 *Army Act 1955* and *Air Force Act 1955*

¹⁷ s.36 *Naval Discipline Act 1957*

¹⁸ s.64, *Army Act 1955* and *Air Force Act 1955*

¹⁹ s.38, *Naval Discipline Act 1957* and s.57, *Army Act 1955* and *Air Force Act 1955*

answer on attestation); while the offences with which civilians can be charged when accompanying the Armed Forces overseas in peacetime are limited.²⁰

In contrast, under this Bill there are only a limited number of Service offences with which civilians could be charged, regardless of the manner in which they are accompanying forces.

These are as follows:

- Clause 4 – Looting
- Clause 13 – Contravention of standing orders
- Clause 27 – Obstructing or failing to assist a service policeman
- Clause 28 (2) – Resistance to arrest etc
- Clause 29 – Offences in relation to service custody
- Clause 39 (3 and 4) – Attempts (in relation to clauses 4,13,27, 28(2), 29, 107 or 302)
- Clause 40 (3) – Incitement (in relation to those offences listed in clause 39 (4))
- Clause 41 (4) – Aiding, abetting, counselling or procuring (in relation to those offences listed in clause 39 (4))
- Clauses 42-49 – Criminal conduct (including attempts; incitement; aiding, abetting, counselling or procuring such offences and air navigation order offences).

The limitations placed upon a CO in terms of his/her ability to investigate the more serious of offences, designated in **Schedule 2**, and the limitations on the offences that can be dealt with summarily, are examined in sections I B5 and I B2 of this paper respectively.

2. Part 2 – Jurisdiction and Time Limits

a. Jurisdiction

Chapter 1 of Part 2 (**clauses 50-54**) sets out the jurisdiction of a CO, the Court Martial²¹ and the Service Civilian Court²² in relation to the trying of offences.

Jurisdiction of the Court Martial

At present a court martial is restricted in its jurisdiction to try certain offences committed in the UK. With respect to the more serious civil offences such as murder and manslaughter committed in the UK, those offences fall within the sole jurisdiction of the civil authorities. This is examined in greater detail in section I A of RP 05/75.

²⁰ These limitations are set out in section B8 of RP 05/75.

²¹ The creation of a single standing Court Martial is examined in section I B7

²² In the *Army Act 1955* and *Air Force Act 1955*, and therefore in the background paper RP 05/75, these are referred to as Standing Civilian Courts.

However, **clause 50** of this Bill states:

The Court Martial has jurisdiction to try any service offence.

Therefore, in future the jurisdiction of the Court Martial will be extended to include more serious offences committed in the UK, in the same way that those offences can be tried by court martial if committed by persons subject to Service law overseas. However, in line with those offences committed overseas, jurisdiction will be concurrent with the civil authorities, and as with all civil offences committed in the UK at present, primacy over investigation and charge will lie with the civil authorities.

Clause 50 (2) also sets out what are considered to be offences within the jurisdiction of the Court Martial, in addition to those listed in Part 1.²³

This extension of jurisdiction has raised some concerns over the ability of charges of murder and other serious offences to be tried by the Court Martial consisting of a Judge Advocate and five lay members who are military officers, in contrast to a similar charge being tried in a Crown Court by a jury of twelve where at the very least a majority verdict of 10-2 would be required.

Comments by the Judge Advocate General, His Honour Judge Blackett, in evidence to the Constitutional Affairs Committee on 29 November 2005 regarding the intended number of members of a Court Martial are set out in section I B7 (trial by Court Martial). However, at that evidence session he also went on to state that:

Under current law offences of murder, manslaughter and rape committed in the UK are dealt with by the civilian court and the Court Martial does not have jurisdiction, but those same offences committed overseas can be dealt with by the Court Martial, and that is totalling [*sic*] consistent. If a Court Martial is a satisfactory enough court to deal with murder, manslaughter and rape overseas it certainly should be able to deal with it within this jurisdiction; so I think that change which I proposed in the Armed Forces Bill is consistent and correct.²⁴

Jurisdiction of the Service Civilian Court

The jurisdiction of the Service Civilian Court (SCC) will be largely the same as the Standing Civilian Courts, i.e. it will have jurisdiction over offences committed by civilians overseas and will continue to have the equivalent powers of a Magistrates' Court. However, the offences which it is unable to try will be expanded under **clause 51 (2)** to include any offence relating to enlistment, offences under the *Reserve Forces Act* and an offence under clause 265 regarding failure to comply with a financial statement order.

In contrast to the current position, the SCC will be able to sit anywhere outside of the UK and will have jurisdiction over civilians accompanying or working with the Royal Navy.

²³ These include offences committed under Chapter 1 of Part XIII (testing for alcohol and drugs) and the offence of giving a false answer during enlistment (clause 325)

²⁴ Constitutional Affairs Select Committee, Uncorrected transcript of oral evidence, HC 731-i, Session 2005-06.

Jurisdiction of a Commanding Officer

One of the main aims of the Bill is to harmonise the disciplinary powers of COs across the three Services, both in terms of the offences that can be heard and the rank of the accused to be tried. The current system of summary dealing is outlined in sections B1 and 2 of RP05/75.

Clause 52 makes provision for COs to deal summarily with certain officers and warrant officers in addition to non-commissioned officers and junior ranks or rates, including those members of the Reserve Forces, as is currently the position in the Royal Navy. Specifically, a CO will be able to deal summarily with charges against officers of, or below, the rank of Commander, Lieutenant Colonel or Wing Commander; or personnel of or below the rank or rate of warrant officer. As such the obligation to refer cases to an Appropriate Superior Authority (ASA)²⁵ where the accused is an officer or warrant officer in the Army or RAF, will be abolished. Civilians will be removed from the jurisdiction of the CO.

The offences that can be dealt with summarily by the CO are set out in **clause 53** and **Schedule 1** which refers to those offences committed under section 42 (criminal conduct offences).

The Service disciplinary offences that can be dealt with summarily are largely the same as at present, with the addition of offences under clauses 34 (low flying), 35 (annoyance by flying) and the exclusion of offences under the SDA of damaging billets (section 47 of the *Army Act 1955*) and offences relating to issues and decorations (section 46 of the *Army Act 1955*), which have both been removed from the provisions of this Bill.

The main change from existing legislation is the scope of criminal conduct (civil) offences that can be heard summarily. Part 1 of Schedule 1 sets out those offences, which are currently civil offences that can be heard summarily in the RAF or the Army. However, there are eight offences which can currently be tried by Royal navy COs and which the Royal Navy considers important to retain as offences capable of being dealt with summarily. Those offences are, therefore, listed in Part 2 of Schedule 1. However, those offences may be dealt with summarily only with the express permission of Higher Authority or if the CO is of, or above, the rank of Rear Admiral, Major General or Air Vice Marshal (**clause 54**).

Under **clause 53 (4)** the Secretary of State may, by Order, amend Schedule 1. Such amendments will be made by Statutory Instrument subject to the affirmative resolution procedure.

²⁵ An ASA is defined as a senior officer in the chain of command and at least 2 ranks above that of the accused.

The powers of investigation of a CO are examined in section I B5; while the punishments and sentencing powers available to a CO at summary hearing are outlined in section I B6.

The overriding result of these changes is that the summary jurisdiction of a naval CO will be more limited than it is at present; while the offences which can be dealt with summarily by Army and RAF COs will be expanded.

b. Time Limits for Commencing Proceedings

Chapter 2 of Part 2 (**clauses 55-62**) sets out the timeframe within which disciplinary proceedings must commence against those personnel who have ceased to be subject to the provisions of Service law.

In line with existing provisions it is possible under these clauses for personnel who have left HM forces (regular and reserve forces), or civilians who have ceased to be subject to Service law, to be charged and tried for offences committed by them prior to that date, so long as the charge is made within six months of the date on which he/she ceased to be a member. This time limit would continue to apply even if the person re-joined the Regular or the Reserve forces or was a civilian who became subject to Service discipline again within that six month period.

Under **clause 61**, however, those time limitations will not apply if the Attorney General consents to charges being brought.

Clauses 59-60 also provide for a time limit for commencing disciplinary proceedings in relation to an offence under clause 107 (release from custody after charge)²⁶ and clause 265 (failure to comply with a financial statement order).²⁷

In relation to offences committed under the *Reserve Forces Act 1996*, charges may not be brought either after six months of the alleged offence; after two months from the date on which that person's CO became aware of the alleged offence; two months from when the person was apprehended or, in the case of certain Reservists, six months after he/she ceased to be such a Reservist, whichever period ends last.

c. Double Jeopardy

Clauses 63-66 set out in detail the provisions whereby persons subject to military law who have already been acquitted or convicted for an offence cannot subsequently be tried for the same or substantially the same offence, either again within the military system by Court Martial, SCC or summarily (**clause 63**); or in the civil courts where the offence is a criminal conduct offence (**clause 64**).

Clause 66 is a parallel provision to clause 64 but working in reverse. It essentially provides a bar on any military proceedings being instituted in relation to offences

²⁶ Six months after the date of the offence, or two months after the person is apprehended.

²⁷ Two years after the date of the offence, or six months after the offence became known to a member of the Service Prosecuting Authority.

committed under clause 42 (criminal conduct offences) that have already been tried in the civil courts.

Despite the fact the Bill does not appear to provide for any changes to the rules of double jeopardy, the Judge Advocate General in his evidence to the Constitutional Affairs Select Committee commented that:

Dr Whitehead: I understand that the rule on double jeopardy hitherto has been maintained between military courts and civilian courts, that is, if you are acquitted under the regime of a military court you cannot be retried in a civilian court?

Judge Blackett: Yes.

Dr Whitehead: The distinction, I think, is unclear, however, in terms of the revision of the rules in double jeopardy. Is the distinction on double jeopardy between the courts likely now to follow the revisions to the situation under the Criminal Justice Act?

Judge Blackett: This is a very technical question you are asking me, Mr Whitehead, but Part 10 of the Criminal Justice Act 2003 provides an exception, as you know, to the double jeopardy rule, and you are quite right that Courts Martial are not included, but section 94 of the Criminal Justice Act does deal with the point, and it enables the Secretary of State to make rules under section 31 of the Armed Forces Act 2001, and my understanding is that that has to be done but once it is done it will bring Courts Martial into line with the Crown Court, as it should do.²⁸

Therefore, it is considered possible that the changes to double jeopardy brought about as a result of the *Criminal Justice Act 2003* will be introduced at a later date through secondary legislation.²⁹

3. Part 3 – Powers of Arrest, Search and Entry

Part 3 defines the powers of arrest in relation to Service offences and the powers of search and seizure.³⁰

For the most part these powers are exercised by the Service police, although provision is made in several of the clauses for powers to be exercised by other persons subject to Service law.

²⁸ Constitutional Affairs Select Committee, Uncorrected transcript of oral evidence, HC 731-I, Session 2005-06

²⁹ More information on the double jeopardy provisions of the Criminal Justice Act 2003 are outlined in Library Research Paper RP02/74, *The Criminal Justice Bill: Double jeopardy and prosecution appeals*, 2 December 2002. This is available online at: <http://www.parliament.uk/commons/lib/research/rp2002/rp02-074.pdf>

³⁰ For background on the role of the MOD Police and the changes to its powers that have been introduced over the last few years are examined in Library Research Papers RP01/97, *The Anti-Terrorism, Crime and Security Bill: Part X: Police Powers*, 16 November 2001; RP02/15, *The Police Reform Bill*, 14 March 2002

a. Arrest and Search on Arrest

Under **clause 67 (2-4)** the powers of arrest are extended beyond Service policemen, who have the power to arrest any persons subject to Service law irrespective of rank and civilians subject to Service discipline (**clause 67 (5)**), to include officers, warrant officers and non-commissioned officers in varying circumstances. Service police will be able to arrest any suspect, irrespective of his rank or rate, without any requirement for further authority. They will also be able to arrest persons whom they suspect of being about to commit an offence.

Supplementary provisions to the powers of arrest in relation to those persons who are no longer subject to Service law or Service discipline are set out in **Clause 68**. Specifically, this clause determines that only a member of the Service police has the power to arrest an individual in respect of an offence covered by clause 61 (outside time limits) and requiring the consent of the Attorney General.

Upon arrest, a Service policeman has the right to search the individual in question if there are reasonable grounds to believe that he/she presents a danger to themselves or others; or may be concealing anything which may help him/her to escape; or which may constitute evidence relating to the offence (**clause 70**).

Any person who is not a Service policeman and who has exercised the powers of arrest outlined above also has the right to search an arrested individual on the grounds that they may present a danger to themselves or others (**clause 71**). The CO of the arrested person also has the power under subsection 4 of this clause to order or authorise the person exercising the power of arrest to search the individual in question for anything that may help him/her escape from Service custody or may constitute evidence relating to the offence. The CO may direct such a search if the assistance of a Service policeman or civilian policeman cannot be obtained and there are reasonable grounds to consider that the arrested individual may conceal, damage, alter or destroy evidence. Under the direction of the Defence Council,³¹ these functions of the CO may be delegated.

Supplementary provisions relating to the permitted extent of such a search are laid down in **clause 72**.

A person exercising these powers of search may seize and retain anything that might be used to cause physical injury; may be used to assist in an escape from Service custody; may constitute evidence of an offence; or has been obtained in the consequence of a commission of a Service offence (**clause 73**).

Under **clause 74** the Secretary of State is able to make provision, by order, for the entry and search of premises in which a person was when, or immediately before, he/she was arrested.

³¹ The Defence Council consists of the Secretary of State for Defence, other MOD Ministers, the Chiefs of Staff and the Permanent and Second Permanent Under Secretary of State.

b. Stop and Search

Chapter 2 of Part 3 sets out the powers of the Service police, and other designated persons, to stop and search persons and vehicles, including ships or aircraft, for stolen or prohibited articles, controlled drugs or HM stores that have been unlawfully obtained.³² Any such goods or items may be lawfully seized under this chapter (**clause 75**). These are based on corresponding provisions in the *Police and Criminal Evidence Act 1984* (PACE).

However, where the person (officer) exercising these powers is not a Service policeman, the range of persons who may be stopped and searched is limited to those Service personnel and civilians who are under the command of that officer (**clause 76**). Orders for search and seizure given under this clause may also only be made with reference to a specific person or vehicle.

The stop and search powers outlined in clauses 75 and 76 may only be exercised in those areas to which the public has access and premises used by HM forces, excluding service living accommodation (**clause 78**). In relation to dwellings or service living accommodation, **clause 79** specifies that a person may be stopped and searched there only if there are reasonable grounds to suspect he/she does not dwell there and is not there with the permission of someone who does. The same provisions apply to vehicles.

The stop and search powers of the Service police are closely based upon those available to the civil police under the PACE.³³

c. Powers of Entry, Search and Seizure

The next group of **clauses (83-93)** gives powers to a Judge Advocate, and in limited circumstances to a CO,³⁴ to authorise the entry and search of specified premises and the seizure and retention of anything relating to that search. These provisions are based on powers provided for in PACE and largely re-enact the provisions set down in the *Armed Forces Act 2001*.³⁵

In summary, when authorising a search warrant, the Judge Advocate must be satisfied that the property in question is a relevant residential premises;³⁶ that there are reasonable grounds for believing that a relevant offence has been committed; that there is material on the premises likely to be of value to an investigation; and that any such material would be admissible in a trial and does not consist of items subject to legal

³² A stolen or prohibited article, a controlled drug or HM stores is defined in clause 77.

³³ Information on the powers of stop and search as set down in PACE is available online at: <http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/stop-search1.html/>

³⁴ A CO's powers to authorise the stop and search of Service personnel, vehicles and the search of premises are set down in the Queens Regulations. For example, ch.5 of the *Queens Regulations for the Army*.

³⁵ Those provisions are outlined in Library Research Paper RP01/03, *The Armed Forces Bill*, 8 January 2001. This is available online at: <http://www.parliament.uk/commons/lib/research/rp2001/rp01-003.pdf>

³⁶ Under clause 84, relevant residential premises means service living accommodation, or the residence of a person subject to Service law, a civilian subject to Service discipline, or a person who is suspected of having committed an offence in relation to which the warrant is sought. In other premises occupied by the Services a CO and the Service police do not need statutory power to enter these areas.

privilege, excluded material or special procedure material (**clause 83**).³⁷ However, the Secretary of State may, by order, establish procedures enabling the Service police investigating a Service offence to apply to a Judge Advocate for a warrant to access excluded or special procedure material that is held in any relevant premises (**clause 86**).

The limited power of a CO to authorise entry and search of a relevant premises by the Service police is laid down in **clause 87**. Significantly, under this provision, that authorisation may be given without possession of a warrant where there are grounds for believing that the time needed to obtain a warrant could frustrate or seriously prejudice the search. Under **clause 88** this power is also extended to allow the CO to authorise entry and search without a warrant by persons other than the Service police. Where any search under either of these two clauses has given rise to property being seized and retained, a Judge Advocate is obliged under **clause 89** to review that search and seizure.

Clause 85 also allows the Secretary of State to make supplementary provisions in relation to warrants that are equivalent to sections 15 and 16 of PACE and specifically where modifications to PACE provisions may be required in order to ensure that the provisions work effectively within the Services.

d. Entry for Purposes of Arrest etc

Clauses 90 and 91 make provision for the Service police, or other person authorised by a CO, to enter and search relevant premises, without a warrant,³⁸ for the purpose of arrest, if there are reasonable grounds to believe that the person to be arrested is on those premises.

The powers of authorisation extended to the CO in clause 91 are however limited to relevant premises occupied by persons within his/her command and where the CO has reasonable grounds to believe that waiting for the assistance of the Service or civil police may result in the person to be arrested evading arrest; concealing, damaging, altering or destroying evidence; being a danger to themselves or others; or that it may undermine discipline or morale.

Under **clause 91 (7)**, the Defence Council may make regulations providing for the CO's functions in this regard to be delegated.

Under **clause 97**, a person exercising the powers of arrest, entry, search and seizure is allowed to use reasonable force in order to exercise that power.

Any property seized by the Service police or by a CO in connection with the investigation of an offence may be disposed of in line with regulations to be made by the Secretary of

³⁷ The meaning of items subject to legal privilege, excluded material and special procedure material is given in sections 10, 11 and 14 of PACE.

³⁸ Relevant premises are defined here as service living accommodation, premises occupied as a residence by a person subject to service law, a civilian subject to service discipline, or by the person to be arrested. The powers of entry and search are extended to communal areas of premises in which there is more than one dwelling, eg. a block of flats.

State, which will reflect the provisions of the *Police Property Act 1897* (as amended) (**clause 94**). Specifically any regulations may enable a Service court or Judge Advocate to order the return of property to its owner or, if the owner cannot be found, to order its disposal as they see fit.

4. Part 4 – Custody

Once a person is arrested for a Service offence and detained in custody the provisions of Part 4 relating to custody are invoked. They are largely the same as those currently set down in the SDA with emphasis on providing safeguards for the detained person by setting strict limitations upon custody powers.

a. Pre-Charge Custody

With the exception of the provisions of clauses 99-102, as set out below, a person cannot be detained in Service custody without being charged with a Service offence (**clause 98**). The CO of the arrested person has certain obligations with respect to complying with this provision which are set out in subsection 2. However, where a CO considers a person to have been unlawfully at large when arrested he/she does not have to fulfil those obligations and therefore does not have to release the arrested person.

Clauses 99-102 set out the exceptions to the general principle that a person cannot be held in custody without charge and the procedures to be followed in this regard. In line with existing regulations, the CO is responsible for authorising detention in custody without charge. However, until the CO is made aware of an arrest, and the grounds on which a person is being kept in custody without charge, it is the responsibility of the person who made the arrest to determine whether there are reasonable grounds for detaining that person without charge. This may be in order to secure or preserve evidence relating to the offence or to obtain such evidence through questioning (**clause 99 (2)**). Once the CO is aware of the facts, it is his/her responsibility to determine as soon as practicable whether to authorise the keeping of that person in custody without charge, in accordance with the provisions of subsection 4. Continued detention may be authorised by the CO for periods of up to 12 hours at a time, after which time that custody must be reviewed (**clause 100**), unless the conditions set out in subsections 3 and 4 apply. However, a person cannot be detained in custody without charge on the authority of the CO for more than 48 hours after the arrest (**clause 99 (5-6)**).

An exception to this maximum period of custody without charge is, however, provided for in **clause 101**. A CO may apply to a Judge Advocate for an extension beyond the maximum period of 48 hours. The Judge Advocate may authorise continued custody without charge for a further 48 hours (96 hours in total after the arrest) if he/she is satisfied that there are reasonable grounds for doing so (i.e. it is necessary in order to secure or preserve evidence relating to the offence or to obtain such evidence through questioning). The Judge Advocate must also be satisfied that the investigation is being conducted diligently and expeditiously (**clause 101 (6)**). However, before he/she is able to grant an extension, the person to whom the application related must be informed in writing, and he/she must attend a hearing before the Judge Advocate. The arrested person is entitled to legal representation at that hearing.

Where a Judge Advocate refuses an application to extend the period of custody without charge before the expiry of the initial 48 hours, he may direct that the person to whom it relates either be charged with a Service offence without delay, or be released from custody (**clause 102 (6)**).

The main change from current provisions relating to custody in clause 101 is that the authorisation for extending the maximum period of custody without charge would no longer be given by a judicial officer. This is because the creation of a standing Court Martial means that there will always be Judge Advocates of the court available to deal with matters requiring judicial oversight.

Clause 103 provides for clauses 98-102 to apply to a person transferred into Service custody either by the civil police or a British Overseas Territory police force.

Under **clause 104** the Secretary of State may make regulations by secondary legislation relating to pre-charge custody.

b. Custody after Charge

Clauses 105-109 address the provisions of custody after charge. In these instances an accused must be brought before a Judge Advocate as soon as is practicable. As with clause 101, the main difference between this provision and the existing regulations is that it would be a Judge Advocate rather than a judicial officer. The Judge Advocate may authorise the keeping of the accused in Service custody for up to eight days, so long as he/she is satisfied that one or more of the following conditions are met:

- Condition A – That if the accused were released he/she would fail to attend any hearings in the proceedings against him/her; commit an offence while released or interfere with witnesses; or obstruct the course of justice in some way. In determining whether this condition is met, the Judge Advocate must consider the nature and seriousness of the offence; the character, antecedents and social ties of the accused; the behaviour of the accused on any previous occasion in which he/she has been charged with a Service offence; and the strength of the evidence against the accused.
- Condition B – That the accused should be kept in custody for his/her own protection, or if under the age of 17 years for his/her own welfare or interests.
- Condition C – Because of lack of time since the accused was charged, it has not been possible to obtain sufficient information to determine whether either of the first two conditions have been met.

If the Judge Advocate does not authorise the keeping of the accused in custody after charge, he/she must be released without delay. This is the equivalent of the granting of bail in the civil justice system. However, release may be subject to conditions in order to, among other things, secure attendance at any future hearings and secure that the accused does not commit an offence while released from custody (clause 107 (3)). These conditions may be varied or removed upon application either by the accused or the accused's CO. If the accused fails to attend a hearing in relation to any conditions that may have been imposed in 'granting bail', it is regarded as an offence and as such is punishable with up to two years' imprisonment.

If authorisation for post-charge custody is granted, that authorisation must be reviewed before the end of the eight day period. If at any time prior to that, the CO of the accused considers that the grounds on which an order was originally made no longer exist, then he/she must release the accused from Service custody or request a review, which must be done as soon as practicable. In conducting a review, the Judge Advocate must apply the conditions as set out above. However, if the accused is represented at a review hearing and gives consent, the Judge Advocate may authorise up to 28 days in custody.

In considering custody during court proceedings the Judge Advocate must take into consideration the three conditions as set out above, with the addition of the following (referred to as condition D):

- If the accused's case has been adjourned for inquiries or a report and it appears to the Judge Advocate that it would be impracticable to complete either the inquiries or the report without keeping the accused in custody.

c. Arrest after Charge

Under **clause 110** the CO of a person who has been charged with a Service offence, or who is awaiting sentence and is not in Service custody, may authorise his/her arrest if there are reasonable grounds to believe that the accused will fail to attend a hearing, commit further offences or interfere with witnesses and obstruct the course of justice. Under subsection 3, further grounds for taking a person into custody after charge are also set out. If a person is arrested under this clause he/she must appear before a Judge Advocate as soon as practicable for his/her case to be reviewed.

The Judge Advocate presiding over court proceedings in relation to the accused is also provided with the same powers in **clause 111**.

5. Part 5 – Investigation, Charging and Mode of Trial

The current procedures for investigation of an alleged offence either by a CO or Higher Authority, the manner in which charges are brought, and the mode of dealing with them, are set out in sections B 1, 2 and 4 of RP 05/75.

a. Investigation

Alleged offences are generally reported in the first instance to the CO. He/she is then responsible for ensuring that the matter is investigated appropriately.

Clause 113 sets down an obligation on the CO to report any allegations in relation to the most serious of offences (designated in **Schedule 2**) to the Service police as soon as is reasonably practicable. Such offences include Service disciplinary offences, such as assisting the enemy or mutiny, and criminal conduct offences, such as murder, manslaughter, or treason. The Schedule also includes a range of criminal conduct offences as set down in other legislation such as the *Children and Young Persons Act 1933* or the *Value Added Tax Act 1994*.

Under subsection 5 of this clause the Secretary of State may, by order, amend Schedule 2.

Clause 114 also requires COs to report allegations relating to certain circumstances to the Service police. Those circumstances will be set down in regulations made under secondary legislation (clause 127). According to the explanatory notes “this is to ensure that where there is some particular sensitivity attached to an allegation, it is subject to examination by the independent Service police”.³⁹

With the exception of those offences in Schedule 2, or cases that fall within clause 114, the CO is required to ensure either that an allegation is investigated in an appropriate manner, or that the Service police are made aware of the alleged offence as soon as is reasonably practicable (clause 115).

Following the investigation of an offence by the police, be it Service, UK or overseas police; any case where there is considered to be sufficient evidence to charge a person with a Schedule 2 offence must be referred directly to the Service Prosecuting Authority (SPA) and not to the CO, as is the case at present (**clause 116**). The case must also be referred to the SPA if there is sufficient evidence of any offence and prescribed circumstances exist (refer to clauses 114 and 127). Other cases must be referred back to the CO.

Under **subsection 4** the Service police can propose not to refer cases directly to the DSP, but in so doing must consult the DSP before the case is referred back to the CO. Where a case involves multiple offences or offenders, under **clause 117** each person’s conduct in relation to each incident must be regarded as giving rise to a separate case. If a case is referred to the DSP, regulations may provide that other related cases must also be treated as referred.

The effect of this group of clauses is to limit the role of the CO in relation to the most serious offences. Effectively these clauses will take away the right of the CO to dismiss any allegations in relation to charges, such as murder, which he/she would have been unable to deal with summarily in any case. The Trooper Williams case, which is referred to in Library Research Paper RP05/75, is a case in point.

b. Charging and Mode of Trial

Powers of a CO

Clause 118 makes provision for the CO to retain initial powers of charging in respect of a case, except in those circumstances where it has been referred from the outset to the Service police because it involves a Schedule 2 offence, or a prescribed circumstance under clause 114, or is a case being investigated either by the civil police or an overseas police force which may be referred to the Service police.

³⁹ *Armed Forces Bill: Explanatory Notes*, EN-94, Session 2005-06, p. 45

A CO also has initial powers of charging in respect of those cases referred back to him after investigation by the Service police or by the DSP.

Consequently, where the offence is one that may be dealt with summarily, the CO may bring one or more charges to be tried in a summary hearing (**clause 119**). If the CO takes the view that he/she should not try the case or part of the case, then he/she has the option of referring it to the Prosecuting Authority (subsection 3). Under subsection 5 regulations may provide that other cases that are related to the one that has been referred must also be treated as referred.

As is the case at present, where an accused has been charged and is to be tried by the CO in a summary hearing, the CO may, at any time either before the hearing or during the hearing, amend or substitute the charge for one which is also capable of being heard summarily; bring additional charges in relation to the case; discontinue proceedings or refer the charge to the DSP with a view to trial by Court Martial (**clause 122**).

The accused also retains the right to elect trial by Court Martial both in relation to an original charge and to any amended, substituted or additional charges brought either before or during summary proceedings (**clause 123, (2) (b)**). This is examined further in Section I B6.

Powers of the DSP

In all of those cases referred to the DSP, either directly by the Service police or by a CO, the DSP has several options, as set out in **clause 120**:

1. The DSP may direct the CO of the individual concerned to bring charges as specified in that direction (subsection 2). If the accused is a civilian and the SCC has jurisdiction, the DSP may allocate the charge for trial by that court (subsection 3).
2. The DSP may refer the case back to the CO (subsection 4) for the CO to consider summary charges if he/she considers it inappropriate to make a direction in respect of that case.

In those cases where charges are brought at the direction of the DSP, and the SCC does not have jurisdiction, then that case must be heard by the Court Martial (**clause 121**).

In line with existing regulations governing the role of the Service Prosecuting Authorities, the DSP has the power to amend or substitute a charge or charges; bring additional charges in respect to the case; or discontinue proceedings in those cases allocated for trial by Court Martial (**clause 124**) or for trial by the SCC where that court has jurisdiction (**clause 125**).

Clause 126 allows for the DSP to make directions that a person be treated as acquitted of an offence for the purpose of barring further proceedings against him/her, either under Service law or in civil proceedings.

For the purposes of Part 5, under **clause 127** the Secretary of State may make, by way of secondary legislation, any regulations considered necessary or expedient in relation to investigations and charging.

6. Part 6 – Summary Hearings, Appeals and Review

The existing procedures relating to trial by summary hearing, an appeal against either the finding or punishment awarded at a summary hearing, and the review process of summary hearings, are set out in sections B1, B2, B3 and B6 of RP 05/75.

a. Summary Hearings

In line with existing provisions, the accused must be given the right, before a summary hearing begins, to elect trial by the Court Martial. If that election is made, the CO must refer the charge to the DSP. If the accused faces multiple charges with respect to the same case, then an election with regard to one charge takes effect as an election in respect of all of them. If a charge is amended, substituted or an additional charge or charges is brought during a summary hearing, that option for election to trial by the Court Martial must be presented in relation to the new charges (**clause 128**).

In those cases where trial by Court Martial has been elected, the powers of the DSP to substitute or bring additional charges are limited without the written consent of the accused (**clause 129 (2)**). This provision is intended to shield the accused from having to face a more serious charge after having elected trial by Court Martial. The ability of the DSP to refer a charge back to the CO, whether it is one that has been amended or substituted or is an additional charge, is also limited without the written consent of the accused (**subsection 3**). If a charge is referred back to the CO under subsection 3 (i.e. with written consent) the accused cannot then elect trial by Court Martial (**subsection 4**). However, if the charge is subsequently amended by the CO after referral the ability to elect is re-instated.

In contrast to the current naval disciplinary system, the right to elect trial by Court Martial will be universal under this Bill.

Along with the CO's ability to amend, substitute or prefer additional charges during a summary hearing, he/she also has the right to dismiss the charge or charges at any stage (**clause 130**), subject to the provisions on summary hearings that may be made in secondary legislation.

At a summary hearing the CO can:

1. Dismiss the charge if it is determined that the charge has not been proved.
2. Record a finding that the charge has been proved and award one or more punishments as appropriate. If multiple charges have been proved, a single award of one or more punishments must be made.

Clause 131 sets out the punishments available to a CO at a summary hearing, while **Clauses 132-138** outline the limits on those powers and any requirements for approval (in relation to detention, reduction in rank, forfeiture of seniority, fines, and service

compensation orders) and the prohibitions on the combinations of punishments that can be awarded. Significantly, the maximum summary punishment available will be 90 days detention on the approval of Higher Authority,⁴⁰ as is the case currently in the Royal Navy.⁴¹ The ability of a CO to award dismissal from HM Service at a summary hearing (as is currently the case in the Royal Navy) will be abolished, although it will remain within the remit of the Court Martial. The punishments awarded at a summary hearing are also subject to the provisions as set out in Chapter 1 of Part 9 (sentencing: principles and procedures) which are examined in section I B9 of this paper.

The overall effect of these clauses will be that the sentencing powers of naval COs at summary hearing will be more limited than at present, while the powers of RAF and Army COs will be expanded.

b. The Summary Appeal Court

The Bill creates one Summary Appeal Court (SAC) for the Armed Forces and replaces each of the single service SAC that were introduced in the *Armed Forces Discipline Act 2000*.⁴² The tri-service SAC will operate in a similar manner to the current SACs.

Clauses 139-149 relate to an accused's right of appeal to the Summary Appeal Court and the powers and proceedings of that court.

Under **clause 150** the Secretary of State may, by way of secondary legislation, make provisions relating to the powers and proceedings of the SAC.⁴³

c. Review of Summary Findings and Punishments

The statutory right of the Defence Council, or other specified authority,⁴⁴ to review at any time the findings and punishments awarded at a summary hearing, or to apply for leave to refer cases to the SAC, are retained in this Bill (**clause 151**). However, the ability of the Reviewing Authority to quash any conviction that it considers to be unlawful has been removed from the provisions of Chapter 3, Part 6. Instead, the Reviewing Authority, on completion of a review, may refer a finding or punishment to the SAC for consideration (subsections 3 and 4). This provision fits with the existing power of the Reviewing Authority to refer cases of doubt to the Court.

The statutory right of the Reviewing Authority to review court martial convictions, and to quash or substitute findings and/or sentences of the SCC will, however, be abolished in this legislation. This is examined in sections B10 and B11 of this paper respectively.

⁴⁰ The standard period of detention will remain 28 days.

⁴¹ Punishments that can be awarded at summary hearing across all three Services are outlined in Appendices two and three of RP 05/75.

⁴² The provisions of this Act are covered in Library Research Paper RP00/12, *The Armed Forces Discipline Bill*, 4 February 2000. This is available online at:
<http://www.parliament.uk/commons/lib/research/rp2000/rp00-012.pdf>

⁴³ Referred to as the Summary Appeal Court Rules.

⁴⁴ Referred to as the Reviewing Authority.

7. Part 7 – Trial by Court Martial

Existing court martial procedures and the powers of punishment of the court are outlined in section B5 of RP05/75.

This Bill establishes a single standing Court Martial that may sit anywhere within or outside of the UK (**clause 153**). The creation of a permanent court will remove the existing need to convene courts martial on an *ad hoc* basis and will remove the different types of courts martial that are currently available.

The constitution of the Court Martial is set out in **clause 154**. It does not provide any details on the number of persons who will sit as members of the court, although this detail will be set out in secondary legislation (**subsection 5**). However, it is expected that the number of members of the court, in addition to the Judge Advocate, will reflect the type of offence.⁴⁵

Judge Blackett commented to the Constitutional Affairs Select Committee that:

This is one of the areas where I am concerned that the Bill has not gone far enough in that currently in the Army and the Air Force there are two types of Courts Martial, there is District Courts Martial and General Courts Martial. The District Courts Martial has a president plus two (i.e. a panel of three people) and has powers of punishment up to two years' imprisonment or detention. The decision on whether it is a District Courts Martial or a General Courts Martial is made by the prosecution. That is clearly wrong, in my view, and under the new Bill there will be a more objective criteria when there is a panel of three or a panel of five. The criteria is not on the face of the Bill, it will be in the rules, but my understanding is that it will be a panel of three [...]

My understanding of the rules is that the three-man court will be able to deal with matters up to 14 years' imprisonment on a simple majority of two to one. I find that objectionable, particularly in view of my aim to replicate the civil system if at all possible. I think if there is going to be a panel of three they should be limited probably to summary only offences or powers of punishment, rather like magistrates, and that all others should be before a bigger court numerically.⁴⁶

Under **clause 155**, the eligibility of officers and warrant officers for membership of the Court Martial will reflect the existing provision for membership of a General Court Martial (GCM). However, two new categories of officer or warrant officer who will be excluded from membership of the court are introduced in subsection 4. These are officers or warrant officers who are Service policemen or members of the Chaplaincy branches of the RAF or Army.

In line with existing provisions, the Judge Advocate will continue to have responsibility for rulings and directions on questions of law, procedure or practice (**clause 158**) and will not be able to vote on the finding of the court. The Judge Advocate will, however,

⁴⁵ More information on this issue is available in Library Research Paper RP05/75, p, 40. This is available online at: <http://www.parliament.uk/commons/lib/research/rp2005/rp05-075.pdf>

⁴⁶ Constitutional Affairs Select Committee, *Uncorrected transcript of evidence*, HC 731-I, Session 2005-06

consider an appropriate sentence along with the other members of the court and will have the casting vote if there is an equality of votes on sentencing (**clause 159**).

On the role of the Court Martial panel in sentencing Judge Blackett expressed the view at the Constitutional Affairs Select Committee evidence session that:

Chairman: Is there a good reason relevant to military operations why the judge should not do the sentencing entirely himself, why the panel should be involved? If you take the analogy with the jury, the jury does not become involved in the sentencing process. Is it a military reason that the panel is involved, because we are talking about a panel consisting entirely of officers?

Judge Blackett: Military officers or a warrant officer, yes. The military reason, or the Ministry of Defence military reason, is that there is a service input into sentencing which is crucial and therefore should be taken account of. My personal view is that a judge advocate should sentence alone, but I do not think the services are yet ready for us to move to that position. It is something that I will be negotiating with the services over the next few years.⁴⁷

Court Martial rules determining the administration, conduct and proceedings of the court, including any changes to pre-trial directions hearings, are to be set down in secondary legislation under the provisions in **clause 162**.

The Court Martial, the SCC and the SAC will also share a Court Administration Officer (**clause 354**). To maintain independence from the chain of command the CAO will be appointed by the Defence Council.

a. Powers of Punishment

The punishments and combination of punishments available to the Court Martial, in accordance with the rank of the accused, are set down in **clause 163**. These provisions largely reflect the current sentencing powers of a GCM which has absolute discretion as to the punishment to be awarded.

However, there will be some limitations on the punishments that can be awarded (subsections 3-6) depending upon age, rank and in particular where the accused has elected trial by Court Martial. In the latter case, the Court Martial is restricted, as at present, to the maximum punishment that the CO could have awarded if the offence had been dealt with summarily (**clause 164**).

In addition, certain limitations will be imposed as a result of the provisions of chapters 4 to 6 of Part 8 (sentencing powers and mandatory sentences) and Part 9 (sentencing: principles and procedures), which are examined in sections B8 and B9 below.

The punishments available for civilians subject to Service discipline or for persons previously subject to Service law, who are tried by Court Martial, are set out in **Schedule 3**.

⁴⁷ Constitutional Affairs Select Committee, *Uncorrected transcript of evidence*, HC 731-I, Session 2005-06

b. Findings of Unfitness to Stand Trial and Insanity

Clauses 165-171 enable the Court Martial to consider and determine issues of unfitness to stand trial and insanity, and to make appropriate orders with regard to persons in parallel with the provisions of the *Criminal Procedure (Insanity) Act 1964*, which are set out in the existing SDA, but as amended by the *Domestic Violence, Crime and Victims Act 2004*.⁴⁸

In summary, the Judge Advocate must determine a person's fitness to stand trial. No other members of the court have a role in this regard. That determination must be based upon the evidence of two or more registered medical practitioners, one of whom must be duly approved for the purposes of section 12 of the *Mental Health Act 1983*. The determination may be delayed until any time before the opening of the case for the defence. If the accused is found not guilty before the question of fitness to stand trial arises, that determination does not need to be made (**clause 165**).

In any determination that an accused is unfit to stand trial, the case shall not proceed further. However, the court must determine whether he/she was responsible for the act or omission that constitutes the offence (**clause 166**).

Clause 167 provides for the position where the members of the Court Martial (but not the Judge Advocate) are satisfied that the accused did the act or omission charged but at the time of the act he/she was insane. The court must then find the accused not guilty by reason of insanity. Again, the evidence of two or more registered medical practitioners, one of whom must be duly approved for the purposes of section 12 of the *Mental Health Act 1983* must be taken into consideration.

Clause 168 sets out the power of the Judge Advocate (not the lay members of the court) to make orders with respect to findings made in either of the two previous clauses.

Clause 169 provides further detail on the making of Service Supervision Orders.

A person who has been made the subject of a hospital order under clause 168 can be remitted for trial by the Court Martial if, on the order of the Secretary of State, and on the advice of the medical officer in charge of his/her treatment, that person is no longer considered unfit to stand trial (**clause 170**).

Schedule 4 of this Bill outlines the modifications to sections 35-38 and 41 of the *Mental Health Act 1983* in respect of their application to the clauses set out above.

⁴⁸ The provisions of the *Domestic Violence, Crime and Victims Act 2004* are outlined in Library Research Papers RP 04/43, *The Domestic Violence, Crime and Victims Bill: Criminal procedure and victims*, 9 June 2004 and RP04/44, *The Domestic Violence, Crime and Victims Bill: Domestic Violence Provisions*, 9 June 2004

8. Part 8 – Sentencing Powers and Mandatory Sentences etc

Part 8 deals with the powers of sentencing with regard to summary hearings, the Court Martial and the SCC. It creates certain non-custodial orders that are unique to the Armed Forces; provides for consecutive and suspended sentences; and applies, with modifications, the provisions of civil legislation, and particularly the *Criminal Justice Act 2003*, hereafter referred to as the CJA03,⁴⁹ with regard to the imprisonment for adults, custodial sentences for young offenders and mandatory sentences for certain offences.⁵⁰

Chapter 1 defines in detail some of the sentences that are available to the Court Martial and in some cases to a CO at summary hearing, the SCC, or both. These particular sentences are either new or amended and are unique to Service law. In some cases they may only be imposed upon persons subject to Service law (i.e. not civilians). In other cases they are similar to, or the equivalent of, sentences available to the civil courts, albeit modified to take account of the Service environment.

Service supervision and punishment orders (clauses 172-173)

These orders are based upon a punishment that is currently only available as a minor punishment under the *Naval Discipline Act 1957*.⁵¹ It has two elements to it. It requires the offender, for a specified period of time, to carry out certain requirements/activities, in addition to forfeiting one sixth of his/her gross pay.

Under **clause 172 (2)** the specified period may be 90, 60 or 30 days; while the requirements/ activities may include, among other things, not taking leave entitlement or extra work and drill. The specific regulations governing these requirements will be set down in secondary legislation.

Under **clause 173** a CO is required to review a Service supervision and punishment order relating to a serviceman under his/her command, in order to consider whether the order should remain in force. The time frame within which reviews should be undertaken and the criteria to be applied will be set out in secondary legislation.

Service compensation orders

Under the current SDA, a court martial or a CO may impose stoppages of pay as a punishment on a member of the Regular forces. In practice these are used to provide compensation where an offence results in personal injury, loss, or damage. With regard to civilians, a court martial or the SCC can make a compensation order to similar effect.

The punishment of stoppages and the compensation order are being replaced in this Bill through **clauses 174-176** by the service compensation order, which will be available for all offenders, though the limits of compensation will vary depending upon who is making

⁴⁹ A copy of the CJA is available online at: <http://www.opsi.gov.uk/acts/acts2003/20030044.htm>

⁵⁰ The sentencing provisions of the CJA are outlined in Library Research Paper RP02/76, *The Criminal Justice Bill: Sentencing*, 3 December 2002. This is available online at: <http://www.parliament.uk/commons/lib/research/rp2002/rp02-076.pdf>

⁵¹ These punishments are set out in Appendix three of RP05/75.

the order. The limits imposed upon a CO in this respect are outlined in clause 136. However there are a number of cases in which a service compensation order cannot be made and these are outlined in **clause 174 (4)**. Restrictions on the making of these orders are also set out in subsections 5-7.

This type of order closely reflects the provisions of section 130 of the *Powers of Criminal Courts (Sentencing) Act 2000*.

Compensation may only be paid once there is no further possibility of an appeal (**clause 175**). If a conviction is restored by the Supreme Court, that court is entitled to make a Service compensation order if the original court of trial could have done so.

Service compensation orders are open to review either by the CO, where he/she made them, or the Court Martial. That review may be undertaken on application by the person against whom the order was made but only after there is no possibility of an appeal. The Court Martial or CO may discharge the order or reduce the amount on the basis of the conditions set down in clause 176 (3).

Service community orders

Clauses 177-179 set out the details and provisions of Service community orders.

These only apply to offenders over the age of 18 on conviction, who are civilians or will be civilians when the punishment takes place (i.e. they are also being sentenced to dismissal), and are going to live in the UK. It is broadly equivalent to a community order made under section 177 of the CJA03 and most of the provisions that apply to such orders are extended to Service community orders.⁵² There are two provisions of the CJA03 that will not apply to a Service community order under this Bill:

- Section 207 (3) (a) (ii) – condition for mental health treatment requirement.
- Section 219 (3) – requirement to give a copy of order to a Magistrate's Court.

Provisions for the periodic review of service community orders in certain instances, in line with the provisions of the CJA03, are outlined in **clause 178**. Significantly, that periodic review will be undertaken by a Crown Court rather than the Service courts.

Clause 179 extends the provisions of Parts 1 and 2 of Schedule 9 of the CJA03 enabling a civil court to make a community order where the offender lives, or will live, in Scotland or Northern Ireland, so that a Service court can make a Service community order in such circumstances.

Part 1 of Schedule 5 extends the provisions of Schedule 8 of the CJA03 setting out the procedure relating to the enforcement, revocation and amendment of community orders,

⁵² These provisions are outlined in Library Research Paper, RP02/76, *The Criminal Justice Bill: Sentencing*, 3 December 2002. This is available online at:
<http://www.parliament.uk/commons/lib/research/rp2002/rp02-076.pdf>

so that, with some modifications, it applies to Service community orders. The enforcement of such orders is a matter for the civil courts.

Overseas community orders

Clause 181 extends the provisions of clause 177 to civilians living overseas. Unlike the Service community order, however, the overseas community order is enforceable by the Service courts.

The requirements of an overseas community order made in respect of an offender over the age of 18 on conviction can include any of the requirements included in a community order under the CJA03, with the exception of an electronic monitoring requirement which is excluded under **clause 182**. That clause also excludes certain other provisions of the CJA03 from applying to overseas community orders including imposing a mental health treatment requirement, the periodic review of a drug rehabilitation requirement and the requirement to specify a local justice area. Subsection 3 also sets down a requirement on the court that makes an overseas community order to provide a copy of that order to a list of specified persons.

In the case of an offender under the age of 18 on conviction, the requirements available to be included in an overseas community order are modified and set out in **Schedule 6**.

Part 2 of Schedule 5 extends the provisions of Schedule 8 of the CJA03 setting out the procedure relating to the enforcement, revocation and amendment of community orders, so that, with some modifications, it applies to overseas community orders.

Conditional or absolute discharge

Conditional or absolute discharge can already be awarded to civilians under existing legislation.

Clauses 184-186 define conditional and absolute discharge; set down the powers of the Court Martial and the SCC in dealing with an offender who has committed a further offence since being conditionally discharged; and outline the subsequent effects of discharge.

a. Consecutive Sentences

Clauses 187 enables Service courts, when passing a sentence of imprisonment, to order that the sentence shall run consecutively to any other sentence of this kind, whether imposed at the same trial or by a Service or civil court on a previous occasion. This clause also applies to certain other custodial sentences, namely detention of an 'under 18' for certain serious offences (outlined in clause 208) and detention of an under-18 for certain violent or sexual offences (outlined in clause 221).

Consecutive sentences of Service detention are covered in **clause 188** which provides for a Service court or CO to make an award of Service detention run consecutively to another period of Service detention, provided that the total period of detention does not exceed two years.

b. Suspended Sentences

Clause 189 allows for a Service court or CO to suspend any sentence of Service detention for between three and twelve months. If during that period the offender commits another offence then the original sentence will take effect upon 'activation' either by the court or CO.

In 'activating' a suspended sentence of Service detention, passed originally either by the court or by a CO, the Court Martial under **clause 190 (3)** can order that the offender serve either the entire period of the original sentence or a shorter period. It can also make the sentence consecutive to another sentence of Service detention provided that the sentences combined do not exceed two years.

A CO can activate a suspended sentence awarded either at a summary hearing or by the SAC, but not one awarded by the Court Martial. In line with the powers of the Court Martial, the CO can alter the period of the sentence and can make any sentences run consecutively (**clause 192**). However, under the following clause (**193**) the term of a suspended sentence activated by the CO must not exceed 28 days while consecutive periods of detention must also not exceed 28 days. However, if the CO is of, or above, the rank of Rear Admiral, Major General or Air Vice Marshal, or authorisation has been granted by a Higher Authority, that period can be extended to 90 days.

Where a suspended sentence has been activated, either by the CO or the Court Martial, the offender has the right of appeal either to the Summary Appeal Court (SAC) (**clause 194**) or the Court Martial Appeal Court (CMAC) (**clause 191**). In hearing an appeal, the CMAC can substitute the sentence for a shorter term than that ordered by the Court Martial or quash the Court Martial's order altogether. The SAC also has the power to quash the order or substitute for that order one which the CO could have originally made and as long as it is not more severe than the order appealed against.

c. Imprisonment for Under 12 Months

Chapter 4 of Part 8 applies, with modifications, some of the provisions of the CJA03 to give the Court Martial and the SCC sentencing powers equivalent to those set down in chapters 3 and 4 of the CJA03 with respect to terms of imprisonment under 12 months.⁵³ In particular, clauses 195-205 give the Court Martial and the SCC the power to impose sentences of custody-plus (but not intermittent custody) and suspended sentences of imprisonment.

'Custody Plus'

Clauses 196-198 deal specifically with sentences of imprisonment awarded with or without a 'custody plus' order. In summary, 'custody plus' sentences were introduced to replace prison sentences of 12 months or less. 'Custody plus' under sections 181 and 182 of the CJA03 comprises a short period in custody of up to three months in order to

⁵³ These provisions are outlined in Library Research Paper, RP02/76, *The Criminal Justice Bill: Sentencing*, 3 December 2002. This is available online at: <http://www.parliament.uk/commons/lib/research/rp2002/rp02-076.pdf>

fulfil the punishment aspect of the sentence, followed by a longer period under supervision in the community for a minimum of six months. In the latter part of the award, requirements must also be attached to address the specific rehabilitation requirements of the offender.

Clause 196 imposes a power, rather than a duty, on the Service courts to make a 'custody plus' order with respect to sentences of imprisonment of less than 12 months. In effect, therefore, a Service court may still pass a custodial sentence but one that does not impose requirements to be complied with during the 'licence' period.

In those instances where 'custody plus' is awarded by a Service court, a period spent in custody will be determined by the court in accordance with section 181 of the CJA03, followed by release on licence for a specific period which will be subject to licence conditions. Under subsection 3 a Service court is prohibited from including in a 'custody plus' order any requirements to be complied with outside of the UK.

Under **clause 197** the paragraphs and schedules of the CJA03 enabling a civil court in England and Wales to make a 'custody plus' order in respect of an offender who resides, or will reside, in Scotland or Northern Ireland, are extended to the Service courts.

However, **clause 197 (3)** and **clause 198** ensure that the Crown Court rather than a Magistrates' Court is able to revoke or amend any 'custody plus' orders originally made by the Service courts.

Suspended Sentences

The CJA03 introduced a key change to suspended sentences of imprisonment. In effect, a court may suspend such a sentence for between six months and two years, on condition that the offender undertakes certain obligations or activities in the community, which are chosen by the court from a list of those available under the generic community sentence. If the offender fails to comply with these requirements, the suspended sentence may be activated. Further offences committed during the period of suspension will also count as a breach. The CJA03 also provides for the courts to review an offender's progress under a suspended sentence and to amend any of the requirements based on the offender's progress.

Clauses 199-205 deal specifically with suspended sentence orders awarded by the Service courts. They modify the provisions of the CJA03 so that a Service court can award a suspended sentence, including a community requirement but, unlike a civil court, a Service court can also make one without such requirements (**clause 199**). Subsection 5 of that clause modifies the provisions of the CJA03 for the purpose of this Bill so that a suspended sentence order can be activated if the offender fails to comply with the requirements of the order, commits a civil offence during the period of that order, or if he/she commits any other Service offence during that period. As with a 'custody plus' order, a Service court is prohibited from including any community requirements to be complied with outside of the UK (subsection 6). In those circumstances, the court would be able to award a suspended sentence without community requirements. **Clause 200** ensures that the provisions of the CJA03 relating to community requirements do not apply to suspended sentence orders awarded by the Service courts without such

requirements. **Clause 201** excludes certain provisions of the CJA03 applying to those orders awarded by the Service courts with requirements.

Under **clause 202**, the review of suspended sentence orders with community requirements made by the Service courts is to be undertaken by the Crown Court, as are any amendments (**clause 204**). **Clause 203** extends to the Service courts the provisions of the CJA03 that enable a civil court to make such orders with respect to offenders who reside, or will reside, in Scotland or Northern Ireland. However, the review of such orders made by the Service courts will also be undertaken by the Crown Court.

Clause 205 gives effect to **Schedule 7** which modifies Schedule 12 of the CJA03 providing for the activation of a suspended sentence following a breach of the community requirements or on conviction of a further offence.

d. Young Offenders

Offenders under the age of 18, when convicted of an offence by either the Court Martial or the SCC, cannot be sentenced to imprisonment for that offence (**clause 207**). This reflects the equivalent provision for civil criminal courts in the *Powers of Criminal Courts (Sentencing) Act 2000*, as amended by the *Criminal Justice and Court Services Act 2000*.⁵⁴ Therefore, **chapter 5** sets out the custodial sentences available to the Service courts for such offenders. These include:

- Detention for certain serious offences, having regard to those which carry mandatory sentences as set out below and general restrictions as set out in clauses 259 and 260 of Part 9 (**clause 208**). This corresponds to detention under section 91 of the *Powers of Criminal Courts (Sentencing) Act 2000*.
- Detention and Training Orders, which correspond to the detention and training order available to civil courts under section 100 of the *Powers of Criminal Courts (Sentencing) Act 2000*. This order supersedes the custodial orders currently available under the SDA and consists of a period of detention and training followed by a period of supervision. These cannot be awarded to an offender under the age of 15 unless the court is of the opinion that he/she is a persistent offender. **Clause 211** specifies the limits on the terms of any detention and training order. **Clause 212** gives effect to several of the provisions of the *Powers of Criminal Courts (Sentencing) Act 2000*, including the power to impose consecutive terms. However, under these provisions only a civil court, and not a Service court, can deal with an offender who breaches his/her supervision requirements upon release from custody. If further offences punishable with imprisonment are committed by the offender during the period of supervision the Court Martial or SCC may make an order for the detention of the offender for a further period, up to the end of the period of supervision that remains outstanding at the time of the offence (**clause 213**). Any sentence passed for the new offence

⁵⁴ Section 89 (1) of the *Powers of Criminal Courts (Sentencing) Act 2000* provides that an offender under the age of 21 cannot be sentenced to imprisonment. This was amended to offenders under the age of 18 by the *Criminal Justice and Court Services Act 2000*. However, the relevant provision is not yet in force.

may be consecutive to, or concurrent with that additional detention period. If a CO or civil court convicted the offender of the new offence, the Court Martial can issue a summons or arrest warrant to secure the offender's attendance so that the court can consider whether to make an order under this clause. Under **clause 215** the offender has the right of appeal.

e. Mandatory Custodial Sentences

Chapter 6 of Part 8 sets out the mandatory sentences to be awarded by the Court Martial for certain offences. **Clause 216** obliges the Court Martial to pass a sentence of life imprisonment for murder and any other offence under clause 42 which under the law of England and Wales has a fixed sentence of life imprisonment. However, if the offender is under the age of 18 then **clause 217** applies.

Clauses 218-223 apply chapter 5 of Part 12 of the CJA 2003. This requires certain sentences to be imposed on conviction of certain violent or sexual offences if the court considers that there is a significant risk of the offender causing serious harm by committing further specified offences.⁵⁵

Clause 224-226 also give effect to sections of other legislation, including the *Powers of Criminal Courts (Sentencing) Act 2000* and the *Firearms Act 1968*, which also impose required sentences on conviction of specific offences.

f. Court Orders

This chapter provides for a number of court orders that the Court Martial and the SCC may make, in line with those available to the civil courts under other legislation, but that are not punishments within the meaning of the Bill. However, if the orders are breached they do carry penalties of varying degrees.

These orders include a Service restraining order (**clause 228**), similar to that provided for under the *Protection from Harassment Act 1997*, which if breached is liable to any of the punishments set out in clause 163, although a sentence of imprisonment must not exceed five years.⁵⁶ The Service restraining order is available even if the defendant has been acquitted.

The second order provided for in this chapter is an order for a parent or guardian to enter into a 'recognizance' (**clause 232**). The powers provided for in this clause can be exercised where a civilian under the age of 18 is convicted of an offence and has a parent or guardian who is subject to Service law or is a civilian subject to Service discipline. The purpose of an order under this clause is to require a parent or guardian to recognise their responsibilities in taking proper care of the offender and exercising proper control over him/her. If the offender commits another offence during this period of recognizance that recognizance may be forfeited and the parent or guardian required to

⁵⁵ More information is available in Library Research Paper, RP02/76, *The Criminal Justice Bill: Sentencing*, 3 December 2002. This is available online at:

⁵⁶ Clause 229 applies the interpretative provisions of the *Protection from Harassment Act 1997* for the purposes of clause 228.

pay a sum up to the amount specified in the original order (**clause 235**). If the parent or guardian 'unreasonably' refuses to enter into a recognizance they can be fined by the court (**clause 232 (2) (b)**).

Both of these orders can be appealed against, either to the Court Martial, for those orders made by the SCC, or to the CMAC for those made by the Court Martial (**clauses 230 and 234**). Under **clause 231** the Court Martial may vary or revoke a Service restraining order on an application from the DSP, the defendant or any other person mentioned in the order. Under **clause 234** the Court Martial may also vary or revoke an order of recognizance following an application from the parent or guardian concerned if it is considered in the interests of justice to do so.

9. Part 9 – Sentencing: Principles and Procedures

Part 9 applies, with some modifications, the general sentencing principles in the CJA03 in relation to deciding sentences for Service offences. It makes a number of new provisions relating to the procedures of the Court Martial and the SCC, in particular, pre-sentence reports and financial and community punishments. **Chapter 1 (clauses 236-253)** applies to both summary hearings and to the Service courts, while **Chapter 2 (clauses 254-270)** relates to the Service courts only.

Chapter 1

Clause 236 sets out the purpose of sentencing for Service offences and requires a CO or Service court to have regard to them. They reflect the provisions of section 142 of the CJA03 but also identify the maintenance of discipline as an additional purpose in sentencing. In addition, the duty to consider the welfare of an offender under the age of 18 is set down; while subsection 3 effectively provides an exemption to these requirements where the sentence must be one that is fixed by law or is outlined in chapter 6 of Part 8 (mandatory sentences).

Clause 237 sets out certain matters that must be taken into consideration when determining sentence, such as previous convictions and aggravating circumstances; while **clause 238** requires a court or CO to take into account a plea of guilty, and the circumstances in which that plea has been made. Subsections 4 and 5 make specific provision for reducing a sentence upon a guilty plea for certain offences for which a minimum sentence would otherwise be required.

Clauses 239-240 also set a specific obligation upon the CO or Service court to treat racial or religious aggravation, and aggravation related to disability or sexual orientation, as aggravating factors when determining sentence.

In awarding a sentence, the CO or court must state the reasons for the sentence, except with regard to those fixed by law or covered by the provisions of chapter 6 of Part 8 (mandatory sentences), and provide an explanation of the sentence with regard to its effect, the requirements of the offender and the implications of failing to comply with it. The CO or court must also explain any power to amend or review the sentence upon application by the offender (**clause 251**). The CO or court must also include as part of its explanation those factors listed in **clause 252**, where applicable.

Clause 253 also ensures that none of the clauses listed affect the power of a CO or a court to mitigate a sentence by taking into account anything that they think is relevant.

Certain principles apply to the award of certain punishments, as follows:

- **Service detention** – a general restriction is placed upon the award of Service detention for a Service offence in that a CO or court must not award detention unless it is considered that the offence or offences are serious enough to warrant such a sentence (**clause 241**). In forming that opinion the circumstances of the offence and any aggravating or mitigating circumstances must be taken into consideration. Any period of Service detention awarded must be for the shortest term that in the opinion of the court is commensurate with the seriousness of the offence (**clause 242**). Combined sentences of Service detention must not exceed two years. If an offender has been kept in Service custody since being charged with the offence in question, that period of time is to be taken into account as regards the sentence awarded (**clause 245**). However, a CO or court may decide, under subsection 3, not to make such a direction. This clause does not apply to suspended sentences, unless that sentence is activated.
- **Forfeiture of seniority and reduction in rank** – under **clause 247** the same general restriction applies as set out in clause 241 in relation to detention.

- **Financial Punishments:**

Fines – before a CO or Service court can determine the amount of a fine, inquiries into the financial circumstances of the offender must be made. The amount of any fine must reflect the seriousness of the offence and the circumstances of the case, i.e. financial circumstances may result in a fine either being increased or decreased. If the offender fails to co-operate with inquiries into his/her financial circumstances, the CO or court may make a determination in this regard (**clause 248**).

Service compensation order – **clause 249** similarly requires a CO or Service court to have regard to the financial circumstances of the offender when determining whether to make a service compensation order and if so, for how much. If the offender has insufficient means to pay both an appropriate fine and appropriate compensation then priority must be given to the latter. Under **clause 250** the CO or court may allow time to pay a fine or compensation or allow payment to be made by instalments.

Chapter 2

The following provisions relate to the Service courts only.

Under **clause 254**, the Court Martial will be brought into line with the SCC and the civil courts, as regards sentencing for multiple offences. Consequently, both Service courts will be required to pass a separate sentence for each offence.⁵⁷

Where the following sentences are being considered by the court, the court will also be required to obtain and consider a pre-sentence report (**clause 255**):

- Service detention
- Custodial sentence
- Dismissal or Dismissal with disgrace.
- A community punishment
- A sentence required by clauses 218-221.

This is a new obligation on the Service courts. As outlined in the CJA03, a pre-sentence report is based on an interview and analysis of the defendant and his/her offending history and needs. It will contain advice about appropriate punishments and what rehabilitation would be likely to prove effective in reducing the risk of re-offending.

Subsection 2 allows the court to dispense with the requirement for a pre-sentence report if it is considered to be unnecessary. However, if the offender is under the age of 18 this may be done only if there is already a report on the individual in question. If cases for offences listed above are appealed and no pre-sentence report was acquired at the original trial, the court hearing the appeal must obtain a report, unless it also feels that the original court was justified in not doing so.⁵⁸ Copies of pre-sentence reports must be given to both the offender or his/her legal representative and to the prosecutor. If the offender is under 18 a copy must also be given to a parent or guardian (**clause 256**).

In addition, under **clause 257** a Service court will be required, unless it considers it unnecessary, to obtain and consider a medical report before passing a custodial sentence, other than one that is fixed by law, on an offender who is, or appears to be, mentally disordered. Following an appeal against sentence, the court hearing the appeal must obtain and consider a report, if one was not obtained at the original hearing (subsection 4).

Clause 258 allows a Service court to depart from any relevant guidelines on sentencing issued by the Sentencing Guidelines Council⁵⁹ if the court considers it is justified in doing so by any relevant features of Service life or the service disciplinary system.

More specifically, certain principles will apply to particular offences, as follows:

- **Custodial Sentences** – with the exception of those custodial sentences that are fixed by law or are required under chapter 6 of Part 8 (mandatory sentences), the court is prohibited under **clause 259** from passing a custodial sentence unless it considers that the offence was so serious that a lesser sentence could not be

⁵⁷ This does not apply to the SAC which, like a CO, will still pass a single sentence.

⁵⁸ This clause does not apply to the SAC which only hears appeals from summary hearings.

⁵⁹ Created under section 170 (9) of the *Criminal Justice Act 2003*

justified. In forming that opinion, the circumstances of the offence and any aggravating or mitigating circumstances must be taken into consideration. Any custodial sentence awarded must be for the shortest term that in the opinion of the court is commensurate with the seriousness of the offence (**clause 260**). In line with the powers of a civil court, **clause 261** enables a Service court to recommend, when imposing a custodial sentence for 12 months or more, particular conditions that should be included in the offender's licence when he/she is released. Section 238 of the CJA03 requires the Secretary of State to have regard to any such recommendations.

However, a Service court must not pass a sentence of imprisonment or detention on an offender who is not legally represented in court, unless he/she, on having been informed of his/her right to legal representation, either refused or failed to apply for it or has previously been sentenced to imprisonment. This clause reflects section 83 of the *Powers of Criminal Courts (Sentencing) Act 2000*.

Under **clause 263**, where a required custodial sentence is passed, the Service court can also include in its sentence any other punishment available to it, with the exception of service detention; a service supervision and punishment order; minor punishments; a community punishment; or a conditional or absolute discharge. At present, where a Court Martial awards a sentence of imprisonment, that sentence automatically incurs dismissal with or without disgrace from HM Services. There is no mention of this automatic link in clause 263, which would, therefore, suggest that it has been removed from this legislation; while the Court Martial is given wider powers in determining what other punishments can be awarded in addition to a custodial sentence.⁶⁰

- **Dismissal** – a sentence of dismissal or dismissal with disgrace may not be awarded unless the court considers that the offence, or combination of offences, is serious enough to warrant such a sentence (**clause 264**). In forming that opinion, the circumstances of the offence and any aggravating or mitigating circumstances must be taken into consideration. Such a sentence cannot be imposed on an offender who is not legally represented in court, unless that right has been refused or the offender failed to apply for representation.

- **Financial Punishments:**

Financial Statement Orders – **clause 265** allows Service courts, other than the SAC, to order an offender to give the court, within a specified period, a statement of his/her financial circumstances before it passes sentence. If a person fails to comply with a financial statement order, without reasonable excuse, or provides false or incomplete information, that is an offence and is punishable with a fine.

⁶⁰ Dismissal is not automatic for Service personnel convicted and sentenced to imprisonment by a civil court, but the Defence Council has the right to exercise discretion in this matter (MOD Memorandum, January 2005, para.24)

Fines – clause 266 allows a court to reduce or remit a fine that has been awarded if it did not have full information regarding the offender’s financial circumstances when it originally imposed the fine.

Order for a parent or guardian to pay a fine or compensation – where an offender is under 18, is a civilian subject to Service discipline and has a parent or guardian who is subject to Service law or Service discipline, the Court Martial or SCC may order the parent or guardian to pay any fine or compensation awarded against the offender. If the offender is under 16 the court has a duty to impose this, unless it is satisfied that such an order would be unreasonable. The parent or guardian has the right to be heard by the court and they have the right of appeal (**clause 267**). **Clause 268** provides for aspects of clauses 248, 249 (1-2) and 266 in relation to the application of fines and compensation.

Community Punishments – a sentence of this kind may not be passed unless the court considers that the offence is serious enough to warrant it, and the restrictions imposed must be commensurate with the seriousness of the offence, or combination of offences and must be in line with what is considered most suitable for the offender. All information, including aggravating or mitigating circumstances must be taken into consideration when forming this opinion (**clause 269**). However, under subsection 7 the court can award a community punishment if the offender has been fined at least three times for service or civil offences committed when aged 16 or over, and the court considers it in the interests of justice to do so. Time already spent in Service custody after being charged is to be taken into consideration in determining any restrictions.

Clause 270 makes the specific provision that none of the clauses in Part 9 apply to the civil courts dealing with an offender for a Service offence.

10. Part 10 – Court Martial Decisions: Appeals and Review

Clause 271 renames the Courts Martial Appeal Court as the Court Martial Appeal Court (CMAC) to reflect the fact that the Court Martial created in this Bill is a single standing court. Subsection 2 also gives effect to **Schedule 8** which amends the *Courts Martial (Appeals) Act 1968* to reflect this change in terminology but also introduces several amendments to reflect changes that have been made both in this Part and elsewhere in the Bill.

Clauses 272-274 give the Attorney General powers, equivalent to those which he already holds in respect of sentences passed by the Crown Court, to refer a case involving a criminal conduct offence to the CMAC, if he considers that the sentence passed by the Court Martial in respect of a given offence is unduly lenient.⁶¹ However, this power is subject to the leave of the CMAC and to the following conditions:

⁶¹ In considering whether a sentence is unduly lenient the Attorney General may consider that the court has erred in law as to its powers of sentencing or that the sentence is not that required by the provisions of clauses 218-221 and 224-226 (required sentences). However, neither of these two considerations limits the power conferred under clause 272 (1).

- The corresponding offence under civil law would, if committed by an adult, be triable only on indictment.⁶²
- The offence is one specified in an order to be made by the Secretary of State.

Following a reference by the Attorney General, the CMAC may quash the sentence passed by the Court Martial and substitute an appropriate sentence which the Court Martial would have had the power to pass originally (**clause 272 (5)**).

Sentences passed by the Court Martial on appeal from the SCC are exempt from this clause (**clause 272 (8)**).

Whilst these powers conferred on the Attorney General partly contain an aspect of review of court martial convictions, which is currently a statutory right of the Reviewing Authority, it is not a wholesale replacement for the role of the Reviewing Authority. In recent years the right of the Reviewing Authority to review and amend courts martial convictions has been criticised by the European Court of Human Rights as non-judicial interference. Therefore its role in this regard will be abolished under this Bill. This is reflected in **paragraph 7 of Schedule 8**.

In his evidence to the Constitutional Affairs Select Committee Judge Blackett commented:

The Bill does get rid of review, abolish review. My concern there is that it simply goes without any replacement. My view is that the Bill should include a slip-rule, rather like the Crown Court have, which is a power under section 155 of the 2000 PCCSA, which enables a judge within 28 days of passing sentence to revisit that sentence and increase or reduce the sentence, but certainly some post trial review, and I think, particularly where a court has made a technical error, on the face of the Bill at the moment all those technical errors will have to be rectified by the Court of Appeal, the Court Martial Appeal Court. It would be much better were there a slip rule to deal with that.⁶³

Clause 273 also allows either the Attorney General, or the offender involved in a case that has been subject to review under clause 272, to refer to the Supreme Court any point of law involved in any sentence passed in those proceedings. However, leave to do so must be granted by the CMAC or the Supreme Court, if it is considered that the point of law is one of general public importance and that it should be considered by the Supreme Court.

Supplementary provisions in relation to clauses 272-273 may be made by the Secretary of State in secondary legislation (**clause 274**).

The significant amendments in Schedule 8 relating to the Court Martial Appeal Court are as follows:

⁶² i.e. tried at the Crown Court

⁶³ Constitutional Affairs Select Committee, Uncorrected transcript of evidence, HC 731-i, Session 2005-06

- Paragraph 11 inserts a new section (section 13) into the *Courts Martial (Appeals) Act 1968* to reflect the fact that the Court Martial will be obliged to pass separate sentences in respect of each conviction rather than one sentence for multiple offences (clause 254). Section 13 will allow the CMAC to substitute an individual sentence, provided that the appellant's sentences, when taken together, for all offences of which he remains convicted, are no more severe than the sentences originally passed by the Court Martial. Section 16A of the Act is also new on the basis that separate sentences must now be passed.
- Paragraph 14 repeals section 15 of the Act which allowed the CMAC to substitute a finding of guilty so as to attract a different sentence.
- Paragraphs 15, 22-24, 26-27 make amendments with respect to appeal against findings of insanity or that the appellant was unfit to stand trial.
- Paragraph 39 amends section 38 of the Act by expressly placing the responsibility to defend any appeal on the DSP, rather than the Defence Council. Paragraph 44 also sets out that the DSP, rather than the Secretary of State, is responsible for making an application for leave to appeal to the Supreme Court.

In addition, Part 10 creates arrangements for the payment of compensation to a person who has been subject to a miscarriage of justice at Court Martial (**clause 275**). This provision will operate in parallel to section 133 of the *Criminal Justice Act 1988* and is in addition to arrangements for *ex gratia* payments by the MOD for wrongful convictions by the Service courts which are made on the same basis as those which are provided for by the Home Office.

In order for compensation to be paid, an application must be made to the Secretary of State, who has the power under clause **275 (4)** to determine whether there is a right to compensation. The level of compensation is to be determined by an assessor appointed by the Secretary of State, who must take into consideration the list of factors outlined in subsection 6. The criteria for the appointment of an assessor are set out in **Schedule 9**.

11. Part 11 – The Service Civilian Court

The clauses in Part 11 create a Service Civilian Court (SCC), which replaces the Standing Civilian Court, and make provision for the court and its proceedings. In future the Service Civilian Court will also apply across all three Services in contrast to the Standing Civilian Court which at present can only try civilians that have committed an offence under the *Army Act 1955* or the *Air Force Act 1955*.

The current role, jurisdiction and powers of punishment of the SCC are outlined in section B8 of RP 05/75.

The main changes with respect to SCC proceedings are the replacement of the power to direct where trials can take place. Provision is made in **clause 276** for the court to sit anywhere outside of the UK, Channel Islands and Isle of Man and not just in the designated areas of the Standing Civilian Court. The creation of a power analogous to

the power of a Magistrates' Court for the court to decide whether it or the Court Martial should try a charge is also set out (**clause 278**).

Specifically, that clause introduces the power for the SCC to decide, before a charge is put and a plea entered, whether to try the charge by giving the prosecuting authority the opportunity to inform it of any previous convictions of the defendant and also giving both the prosecution and the defendant the opportunity to make representations about which court should try the charge. In making that decision the court must take into account those factors listed in subsection 3 of clause 278, namely: the nature and seriousness of the offence; whether its powers of punishment would be adequate; and any other relevant circumstances and any representations made by both prosecution and defendant. If the SCC decides to refer a charge to be tried by the Court Martial, then Part 5 subsequently applies. Where the SCC decides it should try a charge, the right of the accused to elect trial by the Court Martial remains (**clause 279**).

Like the Court Martial (clause 160), the SCC also has the power to convict a person of a Service offence other than that with which he/she had been charged (**clause 280**).

The punishments available to the SCC are set out in **clause 281**. Limitations apply to those punishments in line with chapters 4 and 5 of Part 8 (Imprisonment for term under 12 months and Young offenders: custodial sentences) and Part 9 (sentencing: principles and procedures), as outlined in sections B8 and B9 above. **Clause 282** also determines that the maximum sentence of imprisonment is 12 months, and where the court imposes terms of imprisonment to run consecutively, they must not exceed 65 weeks in total. **Clause 283** determines the maximum amount for fines and compensation orders. Service community orders may only be made in line with the conditions set out in clause 177.

Schedule 10 sets down further provisions relating to the proceedings of the SCC. In particular, paragraph 2 makes the provision that if a question arises at a trial regarding the defendant's fitness to stand trial, or questions arise over the sanity of the defendant at the time of the offence, the SCC must refer the charge to the Court Martial for trial by that court.

Under **clause 287** the Secretary of State may also make rules to provide for all matters relating to the SCC.

a. *Right of Appeal*

In line with current SCC regulations, the right of appeal to the Court Martial remains (**clause 284**). However, that appeal must be brought within an initial period of 28 days, in contrast to the current Notice of Appeal period which is 40 days. Yet, under subsection 3 (b) leave may be given by the Court Martial for that 28 day period to be extended. The Court Martial will re-hear the charge and/or sentence, and proceedings will be in line with Parts 7 (Trial by Court Martial) and 9 (Sentencing: principles and procedures) in relation to trial by Court Martial (**clause 285**). As is the case at present, the Court Martial will only be able to pass a sentence that the SCC would have originally had the power to pass in respect of the offence concerned.

However, in contrast to the current position, the right of a Reviewing Authority to review the finding or sentence of the SCC at any time and quash or substitute the finding and/or sentence will be removed.

12. Part 12 – Service and the Effect of Certain Sentences

Part 12 makes provision for the commencement of sentences and addresses the subsequent effects of sentencing on an offender, such as the effect on his/her rank. It provides for a sentence of Service detention to be served in a Service establishment, unlike a sentence of imprisonment which is served in a civil prison, and provides various powers to make rules about Service custody both before and after sentence.

a. Commencement of Sentence

With the exception of suspended sentences or a sentence passed by the Court Martial on appeal from the SAC, all sentences passed by the Court Martial or SCC have effect from the day on which they were passed (**clause 288**). An award of Service detention by a CO, other than a suspended sentence or where an award is to run consecutively, is automatically suspended for 14 days from the date of award in order to allow for the right of appeal to the SAC (**clause 289**). However, an offender has the right to elect to commence his/her sentence immediately. That election can be withdrawn at any time within the 14 day appeal period, in which case the sentence will resume at the end of the appeal period, unless an appeal is brought in the meantime. These rights will be retained under this clause. If an appeal is brought within the specified time the sentence remains suspended until that appeal is either abandoned or determined. If the SAC quashes the sentence or substitutes another punishment, the provisions regarding the resumption of sentence will not apply.

Clause 290 makes equivalent provisions to those set out in the previous clause, where consecutive terms of Service detention have been awarded.

b. Effect of Certain Sentences

As outlined above, the Court Martial will be able to pass a sentence of imprisonment without also automatically awarding dismissal or dismissal with disgrace. Therefore, **clause 291** determines that where a custodial sentence is passed on a warrant officer or non-commissioned officer (NCO) without a sentence of dismissal or dismissal with disgrace, the offender's rank or rate will automatically be reduced to the lowest rank or rate of his/her Service on release. The exception to this is if the offender is a member of the RAF or any other air force, in which case he/she will be reduced to the highest rank held as an airman. **Clause 292** also determines that the warrant officer or NCO will be treated as holding the lowest rank or rate of his/her Service during the period of the sentence itself.

Where a sentence of dismissal or dismissal with disgrace is passed, if the offender is a commissioned officer then his/her commission is forfeit; while personnel of the rank of warrant officer or below are reduced to the lowest rank or rate of his/her Service and discharged, or if a member of HM air forces, the highest rank he/she held in that force as an airman (**clause 293**).

c. Serving a Sentence

Clause 294 provides that a person sentenced to Service detention may be detained in Service custody but may not be detained in a civil prison during such a sentence.⁶⁴

Where a custodial sentence of imprisonment has been passed, or an order has been made for the detention of an offender who has committed an offence during the currency of a detention and training order, the offender will, under **clause 295**, serve that sentence in a civil prison. However, until transfer to an appropriate establishment, the offender may be kept in Service custody. At present an offender may be committed to a civil prison in England and Wales, Scotland or Northern Ireland. However **clause 296** restricts this to institutions in England and Wales.

Clause 298 confers powers upon the Secretary of State to make rules, by secondary legislation, about Service custody and the serving of sentences imposed by Service courts, including provisions for the treatment and discipline of persons in Service custody; the places in which Service custody may be served; the transfer of persons from one place or type of custody to another, and the committal of persons under sentence to appropriate civil establishments. **Clause 297** imposes a duty upon the Governor of such an establishment to receive and confine persons in accordance with these regulations.

If an offender spends any period of his/her sentence either unlawfully at large or on temporary release on compassionate grounds, that time shall not count against his/her sentence and as such that period of sentence will be extended (**clause 299**). However, this clause is only applicable to sentences of Service detention and custodial sentences where the period of absence occurs before the person arrives at the civil establishment. Those persons considered to be unlawfully at large can be arrested and returned by the Service police under powers conferred by **clause 300**.

Where a custodial sentence is passed on an offender already serving a sentence of Service detention, a service supervision order or a minor punishment, either for a Service offence or by a civil criminal court, then the remainder of that sentence will be remitted and the offender will commence the new custodial sentence in the relevant institution (**clause 300**).

Clause 301 makes clear that the provisions of Part 12 apply only to sentences imposed by the Service courts and do not apply to those imposed by the civil courts.

13. Part 13 – Discipline: Miscellaneous and Supplementary

This Part of the Bill provides for a number of miscellaneous matters relating to discipline.

⁶⁴ Service detention is to be carried out at the Military Corrective Training Centre in Colchester and other licensed units. More information on this aspect is available in the Explanatory Notes to the Bill.

a. Testing for Drugs and Alcohol

In the SDA, failure to give a test for drugs and alcohol or a test for drugs and alcohol after a serious incident are set down as offences in Part II of the *Army Act 1955* and *Air Force Act 1955* and Part I of the *Naval Discipline Act 1957*. However, the provisions in this Bill relating to these issues are more detailed, in particular with respect to the authorisation for tests to be carried out.⁶⁵

Clauses 303-306 deal with drugs and alcohol. These clauses do not limit the statutory powers to test for alcohol or drugs under PACE or the *Road Traffic Act 1988*, nor do they affect the admissibility of evidence obtained under those statutes in any proceedings.

Clause 303 provides a power to demand a urine sample from a person subject to Service law in order to test for drugs. However this power is limited when the drug testing officer or his/her CO is also the CO of the person being tested; or where the sample is being sought in connection with an offence or in connection with the investigation of an incident as set out in clause 304. As at present, failure to produce a sample for testing is an offence under this clause and is punishable with any of the punishments set down in clause 163, although any sentence of imprisonment or Service detention must not exceed 51 weeks.

Clause 304 provides a power to demand a sample (either urine or breath) from a person subject to Service law or Service discipline, for the presence of alcohol or drugs after a serious incident as defined in subsection 1 and where, in the opinion of the CO, the person being tested may have caused or contributed to that incident. As at present, failure to produce a sample for testing is an offence under this clause and carries the same punishments set out in the previous clause. The meaning of 'drug' with respect to clause 304 is wider, however, than in the previous clause as the Secretary of State is conferred with powers in **clause 305** to make an order specifying the other types of drug to be covered by clause 304.

In addition, the Defence Council may make regulations, by secondary legislation, governing the manner in which samples can be obtained and analysed, including the number of samples to be taken and the circumstances in which different types of sample may be required (**clause 306**).

The results of tests under clauses 303 or 304 are not admissible as evidence in proceedings for a service offence.

b. Contempt of Court

Chapter 2 of Part 13 sets down provisions enabling Service courts to deal with misbehaviour by any person either at the court or in relation to proceedings before the court. These clauses provide the equivalent of the contempt of court powers which exist in the civil system.

⁶⁵ The powers set out in Part 13 are intended to underpin the operation of the current random drug testing programme under which all members of HM Forces, regardless of rank, are subject to periodic random testing.

Existing powers under the SDA, including offences in relation to courts martial, are replaced through clauses 307-310 with a single approach regardless of the rank or rate of the offender. Where the court is sitting in the UK these powers can be exercised against anyone and are not restricted to persons subject to Service law or Service discipline. Outside of the UK, contempt under the provisions of these clauses may be committed only by a person subject to Service law or Service discipline (**clause 307 (6)**).

The offences of misbehaviour in court are set out in **clause 307 (1)**. However, the punishment for an offence under subsection 1 differs between persons subject to Service law or Service discipline and other civilians. If the offender is a person subject to Service law or discipline the Judge Advocate may order him/her to be detained in Service custody for a period not exceeding 28 days, impose a fine, or both. Other persons may face a fine of up to £2,500 (**subsections 2 and 3**). A court may at any time revoke an order of committal under this clause. The powers to detain a person committing an offence under clause 307 are set out in **clause 308**.

More serious forms of contempt beyond those outlined in clause 307 are to be dealt with by the civil courts (**clause 309**). A Service court can also refer a matter to the civil courts if it chooses to do so under this clause. This provision is similar to that already available to a number of other courts and tribunals such as the Data Protection Tribunal (section 6 of the *Data Protection Act 1998*).

In all cases these powers are to be exercised by the Judge Advocate (**clause 310**).

c. Arrest and Detention by the Civil Authorities

Clause 311 permits a Judge Advocate to issue a warrant to the civil police either in the UK or in any British Overseas Territory, for the arrest of a person reasonably suspected of having committed a Service offence. Any person arrested under a warrant issued under this clause must be transferred to Service custody as soon as is practicable.

The practice and procedure to apply to warrants issued under this section is to be set down in regulations made by the Secretary of State.

Arrest for desertion or absence without leave (AWOL) is dealt with in clauses 312-315. The civil police in the UK or in an British Overseas Territory may arrest, with or without a warrant, any person who is reasonably suspected of being subject to Service law who has deserted or is AWOL (**clause 312**). A person arrested under the provisions of this clause must be brought before a court of summary jurisdiction as soon as is practicable.

Deserters and persons who are AWOL who surrender themselves to the civil police must be either delivered into Service custody, be brought before a court of summary jurisdiction or released on the condition that he/she reports within a specified time to enable him/her to be taken into Service custody (**clause 313**).

When a person is brought before a court of summary jurisdiction either on the basis of an admission of guilt or when the court is in possession of evidence, and he/she is in custody only for illegal absence and the required evidence exists, the court must arrange for the suspect to be delivered into Service custody or released with conditions in respect

of a later appearance. This is the equivalent of being granted bail by a Magistrates' Court (**clause 314**).

Where a person fails to comply with the conditions of his/her release under clauses 313 and 314, a warrant may be issued for his/her arrest under the provisions of **clause 315**. The warrant may be issued by a Judge Advocate, or if the release was authorised by a civil court, a person authorised to issue arrest warrants in the jurisdiction of that court.

Clause 316 provides for a civil police officer or British Overseas Territory police officer to arrest a person, with or without a warrant, who has been sentenced to Service detention and is unlawfully at large.

Regulations regarding transfer from civil to Service custody are to be set out in regulations made by the Secretary of State (**clause 317**).

d. Financial Penalty Enforcement Orders

The SDA currently make provision for financial penalty enforcement orders, as a means of enforcing unpaid or un-recovered fines, stoppages and compensation orders awarded where that person is no longer subject to Service law or a civilian to whom relevant parts of the SDA apply. A financial penalty can be enforced by a Magistrates' Court in England and Wales, the Sheriff court in Scotland or the court of summary jurisdiction in Northern Ireland. **Clause 319** makes provision for the Secretary of State to make regulations applying these powers for the purposes of this Bill.

e. Criminal Justice Enactments

Clause 320 provides the Secretary of State with powers to make orders, by way of secondary legislation, in respect of any criminal justice enactments passed after 1 January 2001 which amend the law of England and Wales. In effect this clause allows, where appropriate, for changes to be made to Service law following any changes in the law relating to the civil justice system. This will enable the system of Service law to keep pace with civil law, where practicable.

Secondary legislation under this clause is exercisable by Statutory Instrument under the affirmative resolution procedure. This requires that a draft of the Statutory Instrument be laid before each House of Parliament, to be approved by each, by means of a Resolution (**clause 363**).

f. Burden of Proof

In contrast to general criminal proceedings, **clause 322** imposes a burden of proof on an accused with respect to any offence committed under Parts 1 to 13 of this Bill in which having a lawful or reasonable excuse is a defence to the offence being charged. Under this clause the accused does not have to prove that he/she had the excuse beyond all reasonable doubt, but that "sufficient evidence is adduced to raise an issue as to

whether he had such an excuse".⁶⁶ What is regarded as sufficient, however, could be expected to vary.

C. Other Provisions

1. Part 14 – Enlistment, Terms of Service etc

a. *Enlistment*

Enlistment is the process by which a person joins the regular forces when not commissioned. Currently, a person joining the Army, Royal Marines or RAF must take an oath of allegiance (or affirms his/her allegiance) to the Sovereign. Currently members of the Royal Navy do not have to swear such an oath. The validity of a person's enlistment is also attested by a recruiting officer who acts as a witness to the truthfulness of a recruit's declarations on the enlistment form.

A person joins the Armed Forces for a specified period of Regular service and potentially a subsequent period in the Reserves.⁶⁷ A recruit's enlistment may be subject to a final approval process in order to take into account any significant changes in circumstances since his/her offer to enlist was originally accepted.

Where a person is convicted of an offence involving absence from duty, he/she will forfeit service for that period of time. Forfeiture of service results in loss of pay for the relevant period. In this situation a person may also be required to continue to serve beyond his/her original discharge date in order to complete the terms of his/her engagement.

Clauses 325-328 give power to the Defence Council to make regulations, exercisable through secondary legislation, in relation to the following aspects of enlistment and service:

- **The process of enlistment** – including the appointment and duties of recruiting officers; the consent to enlistment for a person under 18; the rights to discharge and the creation of an offence of false enlistment and the maximum punishments that can be awarded for such an offence if tried in either the military system or the civil courts.⁶⁸ It is expected that, under the regulations made by secondary legislation, the duty to swear an oath, or affirm, allegiance to the Sovereign will also be extended to the Royal Navy.
- **Terms and conditions of enlistment and service** – including the duration of the term for which a person has enlisted and the ability to end or extend service. The regulations could also provide for the compulsory transfer of members of one Army corps or Reserve corps to another in prescribed circumstances.

⁶⁶ *Armed Forces Bill*, clause 322, subsection 2

⁶⁷ Regular army personnel are subject to a period of 'reserve liability' upon leaving HM Forces dependant upon their length of service in the Regular forces.

⁶⁸ False answer on enlistment is a Part II offence in the *Army Act 1955* and *Air Force Act 1955* and a Part I offence in the *Naval Discipline Act 1957*.

- **Desertion and absence without leave: forfeiture of service** – including regulations determining whether a person confessing to the offence of desertion should be tried for the offence, and the forfeiture and restoration of service in such cases; regulations regarding forfeiture of a person convicted of such an offence at court martial and the issue of certificates for persons who are absent beyond a prescribed period of time.
- **Discharge from the Regular forces and transfer to the Reserve** – including regulations regarding the rights of warrant officers to discharge following reduction in rank or rate.

Clause 329 also provides for the CO to reduce a person's rank or rate administratively. This power is separate from the sentencing powers of a Service court or of a CO at summary hearing.⁶⁹ However, this power is restricted by the rank of the CO, the rank of the person involved and the extent to which a person can be reduced. A CO who is or, or below, the rank of Commodore, Brigadier or Air Commodore may, for example, only make such an order with the permission of Higher Authority. Clause 329 does not apply to reductions in rank that are awarded by virtue of a sentence (subsection 5).

Clause 334 also sets down the restrictions on the recruitment of persons other than British protected persons or citizens of the UK, the Commonwealth or the Republic of Ireland. Under subsection 2 however, the Defence Council may make regulations identifying those 'aliens' who should be allowed to join the Armed Forces. Nepalese Gurkhas, for example would fall within this provision.

b. Redress of Grievances

The internal system for the redress of grievances is summarised briefly in RP 05/75 and more fully in the Explanatory Notes to this Bill.

The intention of this section of Part 14 (**clauses 330-333**) is to make provision for the process of redress to become quicker and more efficient. Specifically redress will still be considered by a CO in the first instance and then by the chain of command (**clause 330**). However, the Bill creates a Service Complaints Panel which will largely undertake the current work of the Service Boards with respect to complaints (**clause 331**). Cases that are not capable of being resolved by the chain of command can be referred to that panel. As such the Panel will be given delegated powers to act on behalf of the Defence Council and will consist of at least two members who civil servants or senior officers, i.e. of the rank of Commodore, Brigadier, Air Commodore or above. At least one of the panel members must be a senior officer. The membership of the panel will come from outside the chain of command of the complainant and even from another Service or the Civil Service. Regulations may be made by the Secretary of State to require that, in certain circumstances, an independent member sits on a Service complaints panel. The explanatory notes suggest that that the presence of an independent member of the panel

⁶⁹ Administrative action is set out in greater detail in Library Research Paper RP05/75, *Background to the Armed Forces Bill*, 11 November 2005.

is likely to be appropriate in complaints relating to bullying or harassment, although that scope may be broadened in secondary legislation (**clause 332**).

The Defence Council will continue to retain jurisdiction over certain Service complaints for consideration by itself through the relevant Service Board. Under **clause 331 (7)** the Defence Council may authorise either the panel or a specific person to investigate a complaint on their behalf.

In line with current policy an officer who is dissatisfied with the decision of the Service Board may request that his/her case be referred to HM The Queen. However, **clause 333** specifies that a Service complaint by an officer must have previously been considered by the Defence Council through the relevant Service Board, and not the Service Complaints Panel. Therefore, the number of issues on which an officer may now complain to HM The Queen will be limited to the more serious matters that the Defence Council has reserved for itself.

The rules and procedures for determining the process for making and dealing with Service complaints are to be set down in secondary legislation.

2. Part 15 – Forfeitures and Deductions

The pay of members of the Regular forces may not be forfeited unless authorised by primary legislation; while deductions from pay may not be made unless authorised by primary legislation or by an Order in Council made under the *Naval and Marine Pay and Pensions Act 1865*, by *Royal Warrant* or under section 2 of the *Air Force Constitution Act 1917*. The Defence Council has the power to set down a minimum rate of pay that cannot be deducted i.e. it is not subject to forfeiture. However, any amount received for that period may be recovered by deductions from pay.

The manner in which pay may be forfeited or deducted under the current SDA is set out on pages 121-123 of the explanatory notes.

Clause 335 extends the general provisions relating to forfeiture and deductions of pay as set out above. **Clause 336** creates the power for the Secretary of State to make regulations with regard to forfeiture or deductions of pay as listed in that clause.

3. Part 16 – Inquiries

Under Part 16 Service inquiries will replace the different statutory and non-statutory provisions for holding formal inquiries, whether they are Boards of Inquiry, Unit and Regimental inquiries or ships' inquiries.⁷⁰

A Service inquiry will be an internal inquiry for the purpose of establishing the facts of a matter or incident and making recommendations so as to prevent a recurrence. An

⁷⁰ More information on the rules and procedures of Boards of Inquiry is available in RP05/75.

inquiry will be conducted by a panel, the membership of which will be determined, among other things, by the nature of the inquiry itself.

The rules and procedures of a Service inquiry, including the members of the inquiry panel; the functions of the panel; the persons who may convene an inquiry; the admissibility of evidence and representation of witnesses and more specifically the right of persons to be present at the proceedings of a Service inquiry panel, will all be determined by secondary legislation, as provided for under **clause 337**.

Under subsection 4 those regulations determined by secondary legislation will also provide for the provisions of section 35 of the *Inquiries Act 2005*⁷¹ to apply. Among the provisions of section 35 is the ability to award sanctions for non-compliance with an inquiry, or for actions that are likely to hinder an inquiry.

4. Part 17 – Miscellaneous

a. *Offences Relating to Service Matters Punishable by the Civil Courts*

This section of Part 17 creates a number of criminal conduct offences that can be committed by both persons subject to Service law and discipline and by persons who are not subject to either Service law or Service discipline. These offences include:

- **Clause 338** – Aiding, abetting, counselling and procuring desertion (as defined in clause 8) or absence without leave (as defined in clause 9). A person guilty of committing an offence under this clause may be sentenced by a court of summary jurisdiction to imprisonment for a term not exceeding 12 months or to a fine, or both. If a person is convicted of this offence on indictment, he/she may be sentenced to imprisonment for a term not exceeding two years, or to a fine, or both.
- **Clause 339** – Aiding, abetting, counselling and procuring malingering (as defined in clause 16). This offence carries the same punishment as clause 338.
- **Clause 340** – Obstructing persons subject to service law in the course of duty. This offence carries a sentence by a court of summary jurisdiction of imprisonment for a term not exceeding 51 weeks, or to a fine, or both.

Clause 342 allows for a British Overseas Territory to impose a sentence of detention or a fine higher or lower than that provided for in this Bill so as to allow for local conditions, such as average incomes, which may differ from those in the UK and to allow the BOT to set penalties in line with those provided for within their own law.

⁷¹ More information on the provisions of this Act is available in Library Research Paper RP05/21, *The Inquiries Bill (HL) 2004-05*, 10 March 2005. This is available online at: <http://www.parliament.uk/commons/lib/research/rp2005/rp05-021.pdf>

b. Other Powers and Exemptions

The remainder of Part 17 introduces exemptions for vehicles belonging to HM Forces from tolls and charges (**clause 343**); exemptions with respect to a Service persons' personal property (**clause 344**); powers for certain officers to take affidavits and declarations (**clause 346**); the extension of powers of command relating to rank or rate across the three Services (**clause 347**); powers for the Secretary of State to make regulations regarding the service of process (**clause 348**) and various provisions preventing the assignment of pay, pensions, benefits, bounty, grants or allowances (**clause 349**) in all but certain specified circumstances.

Clause 345 also gives effect to **Schedule 11** concerning the admission to and detention of persons in overseas hospitals if they are suffering from a mental disorder and it is necessary to detain them for their own protection and the protection of others.

Clause 351 gives effect to **Schedule 12** which sets out amendments relating to the Reserve Forces.

Consequential amendments to other statutes as a result of this Bill are set out in **Schedule 14**.

Appendix One – Table of Offences: Relevant SDA and Armed Forces Bill Clauses

Clause in the <i>Armed Forces Bill</i>	Relevant section(s) in the <i>Army Act 1955</i> and the <i>Air Force Act 1955</i>	Relevant section(s) in the <i>Naval Discipline Act 1957</i>
1 – Assisting an enemy	25 – Assisting the enemy	3 – Assisting the enemy
2 – Misconduct on operations	24 – Misconduct in action 63A – Offences against morale	2 – Misconduct in action 35B – Offences against morale
3 – Obstructing operations	26 (1) – Obstructing operations, giving false air signals etc	4 (1) – Obstructing operations, giving false air signals etc
4 – Looting	30 – Looting	5 – Looting
5 – Failure to escape etc	25 (1) (e) – Assisting the enemy	3 (1) (e) – Assisting the enemy
6 – Mutiny	31 – Mutiny	8 – Definition of mutiny 9 – Offences of mutiny
7 – Failure to suppress mutiny	32 – Failure to suppress mutiny	10 – Failure to suppress mutiny
8 – Desertion	37 – Desertion	15 – Definition of desertion 16 – Offences of desertion
9 – Absence without leave	38 – Absence without leave	17 – Absence without leave
10 – Failure to cause apprehension of deserters or absentees	39 – Failure to apprehend deserters or absentees	18 – Failure to report deserters and absentees
11 – Misconduct towards a superior officer	33 – Insubordinate behaviour	11 – Insubordinate behaviour
12 – Disobedience to lawful commands	34 – Disobedience to lawful commands	12 – Disobedience to lawful commands
13 – Contravention of standing orders	36 – Disobedience to standing orders	14A – Disobedience to standing orders
14 – Using force against a sentry etc	29 (b) (c) - Offences by or in relation to sentries, persons on watch etc	6 (b) (c) – Offences by or in relation to sentries, persons on watch etc
15 – Failure to attend for or perform a duty etc	29 A – Failure to attend for duty, neglect of duty etc	7 – Failure to attend for duty, neglect of duty etc
16 – Malingering	42 – Malingering	27 – Malingering
17 – Disclosure of information useful to an enemy	60 – Unauthorised disclosure of information	34 – Unauthorised disclosure of information
18 – Making false records etc	62 – Making of false documents	35 – Falsification of documents

Clause in the <i>Armed Forces Bill</i>	Relevant clause(s) in the <i>Army Act 1955</i> and the <i>Air Force Act 1955</i>	Relevant clause in the <i>Naval Discipline Act 1957</i>
19 – Conduct prejudicial to good order and discipline	69 – Conduct to prejudice of military discipline	39 – Conduct to the prejudice of naval discipline
20 – Unfitness or misconduct through alcohol or drugs	43 – Drunkenness	28 – Drunkenness
21 – Fighting or threatening behaviour etc	43A – Fighting, threatening words etc	13 – Fighting and quarrelling
22 – Ill treatment of subordinates	65 – Ill treatment of officers or men of inferior rank	36A – Ill treatment of persons of inferior rank etc
23 – Disgraceful conduct of a cruel or indecent kind	66 – Disgraceful conduct	37 – Disgraceful conduct
24 – Damage to or loss of public or service property	44 – Damage to, and loss of, public or service property 44A – Damage to, and loss of, HM aircraft or aircraft material 44B (1) (a) – Interference etc with equipment, messages or signals	29 – Damage to, and loss of, public or service property 29A – Damage to, and loss of, HM aircraft or aircraft material 29B (1) (a) – Interference etc with equipment, messages or signals
25 – Misapplying or wasting public or service property	45 – Misapplication and waste of public or service property	30 – Misapplication and waste of public or service property
26 – Sections 24 and 25: “public property” and “service property”	See 44 and 45 above	See 29 and 30 above
27 – Obstructing or failing to assist a service policeman	35 – Obstruction of provost officers	14 – Obstruction of provost officers
28 – Resistance to arrest etc	55 – Resistance to arrest	33B – Resistance to arrest
29 – Offences in relation to service custody	56 – Escape from confinement	33C – Escape from confinement
30 – Allowing escape, or unlawful release, of prisoners etc	54 – Permitting escape, and unlawful release of prisoners	33A – Permitting escape, and unlawful release of prisoners
31 – Hazarding of ship	48A – Loss or hazarding of ship	19 – Loss or hazarding of ship or aircraft
32 – Giving false air signals etc	26 (2) – Obstructing operations, giving false air signals etc	4 (2) - Obstructing operations, giving false air signals etc
33 – Dangerous flying etc	49 – Dangerous flying	20 – Dangerous flying etc
34 – Low flying	51 – Low flying	21- Low flying

Clause in the <i>Armed Forces Bill</i>	Relevant clause(s) in the <i>Army Act 1955</i> and the <i>Air Force Act 1955</i>	Relevant clause in the <i>Naval Discipline Act 1957</i>
35 – Annoyance by flying	52 – Annoyance by flying	22 – Annoyance by flying
36 – Inaccurate certification	50 – Inaccurate certification	25 – Inaccurate certification
37 – Prize offences by officer in command of ship or aircraft	27 – Prize offences by commanding officers	23 – Prize offences by commanding officers
38 – Other prize offences	28 – Other prize offences	24 – Other prize offences
39 – Attempts	68 – Attempts to commit military offences	40 – Attempt to commit naval offence
40 – Incitement	68A – Aiding and abetting etc, and inciting	41 – Aiding and abetting etc, and inciting
41 – Aiding, abetting, counseling or procuring	68A – Aiding and abetting etc, and inciting	41 – Aiding and abetting etc, and inciting
42 – Criminal conduct	70 – Civil offences	42 – Civil offences
43 – Attempting criminal conduct	70 (2A) – Civil offences	42 (2) – Civil offences
44– Trial of section 42 offence of attempt	70 (2A) – Civil offences	42 (2) – Civil offences
45 – Conspiring to commit criminal conduct	70 – Civil offences	42 – Civil offences
46 – Inciting criminal conduct	70 – Civil offences	42 – Civil offences
47 – Aiding, abetting, counseling or procuring criminal conduct	70 – Civil offences	42 – Civil offences
48 – Provision supplementary to sections 43 to 47	70 – Civil offences	42 – Civil offences
49 – Air navigation order offences	None	None

Appendix Two – Glossary of Terms

ASA – Appropriate Superior Authority

CJA03 – *Criminal Justice Act 2003*

CMAC – Court Martial Appeal Court

CO – Commanding Officer

DSP – Director of Service Prosecutions

GCM – General Courts Martial

HA – Higher Authority

NCO – Non-Commissioned Officer

PACE – *Police and Criminal Evidence Act 1984*

PCCSA – *Powers of Criminal Courts (Sentencing) Act 2000*

SAC – Summary Appeal Court

SCC – Service Civilian Court

SDA – Service Discipline Acts

SPA – Service Prosecuting Authority